(1)
Supreme Court, U.S.
F I
031669 JUN 17 2004

No.

IN THE

Supreme Court of the United States

CITY OF SAN DIEGO, SAN DIEGO CITY POLICE DEPARTMENT, DAVID BEJARANO, GEORGE SALDAMANDO, GLENN BREITENSTEIN,
PETITIONERS

v.

JOHN ROE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PENNY LEA CASTLEMAN
Counsel of Record
OFFICE OF CITY ATTORNEY
1200 3rd Ave
Suite 1100
San Diego, CA 92101
(619) 533-5834
Attorney for Petitioners

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTION PRESENTED

Whether the Ninth Circuit departed from this Court's public concern test in *Connick v. Myers*, 461 U.S. 138 (1983) by promulgating the following new public concern test: "[W]hen the employee's speech is not about his government employer or employment, is directed to a segment of the general public and occurs outside the workplace, that speech satisfies the public concern test because such speech is not related to the employee's status in the workplace." (App., *infra*, 21a.)

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners in this action are the City of San Diego, the San Diego Police Department, former Chief of Police David Bejarano, Assistant Chief George Saldamando, and Captain Glenn Breitenstein. Petitioners were the Defendants in the district court and the respondents in the Ninth Circuit Court of Appeals.

Respondent

The respondent is "John Roe," who is suing under a pseudonym pursuant to a district court order granting him permission to do so. Roe was the plaintiff in the district court and appellant in the Ninth Circuit Court of Appeals.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 12

CONCLUSION 30

APPENDIX

CIRCUIT COURT ORDER (01/29/04) 1a

DISTRICT COURT ORDER (12/21/01) 51a

DISTRICT COURT JUDGMENT (12/26/01) 68a

ORDER DENYING REHEARING (03/22/04) 70a

TABLE OF AUTHORITIES

Page

CASES

BERGER V. BATTAGLIA, 779 F.2D 992 (4TH CIR.1985) 24

CAINE V. HARDY, 943 F.2D 1406 (5TH CIR. 1991) 21

CONNICK V. MYERS, 461 U.S. 138 (1983).....*passim*

COSZALTER V. CITY OF SALEM, 320 F.3D 968 (9TH CIR. 2003) 7

GEARHART V. THORNE, 768 F.2D 1072 (9TH CIR. 1985) 15

HARPER V. CROCKETT, 868 F. SUPP. 1557 (E.D.ARK. 1994)..... 26

HEIL V. SANTORO, 147 F.3D 103 (2ND CIR. 1998)..... 21

LAWRENZ V. JAMES, 852 F. SUPP. 986 (M.D. FLA. 1994) 25, 26

MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION V. DOYLE, 429 U.S. 274 (1977)..... 12

PAPPAS V. GIULIANI, 118 F. SUPP. 2D 433 (S.D.N.Y. 2000).....20, 22, 26, 27

PICKERING V. BD OF EDUC OF TOWNSHIP HIGH SCHOOL DIST. 205, WILL COUNTY, ILL., 391 U.S. 563 (1968) .....*passim*

POOL V. VANRHEEN, 297 F.3D 899 (9TH CIR. 2002)..... 11

RENDISH V. CITY OF TACOMA,123 F.3D 1216 (9TH CIR. 1997) 5

ROE V. CITY AND COUNTY OF SAN FRANCISCO; 109 F.3D 578 (9TH CIR. 1997) 19, 30

ROTH V. UNITED STATES, 354 U.S. 476 (1957).....7

SORANNO'S GASCO, INC. V. MORGAN, 874 F.2D 1310 (9TH CIR.1989) 21

TINDLE V. CAUDELL, 56 F.3D 966 (8TH CIR. 1995).....23, 24, 25

TREJO V. SHOBEN, 319 F.3D 878 (7TH CIR. 2003).....22, 23

TYLER V. CITY OF MOUNTAIN HOME, 72 F.3D 568 (8TH CIR. 1995) 22

ULRICH V. CITY & COUNTY OF SAN FRANCISCO, 308 F.3D 968 (9TH CIR. 2002).....7, 9, 12

UNITED STATES V. NTEU, 513 U.S. 454 (1995).....28, 29

WEEKS V. BAYER, 246 F.3D 1231 (9TH CIR. 2001) 13, 14

OTHER AUTHORITIES

28 U.S.C. § 1254(1) 1

Federal Rule of Civil Procedure 12(b)(6) 5, 21

PETITION FOR WRIT OF CERTIORARI

Petitioners City of San Diego, the San Diego Police Department, former Chief of Police David Bejarano, Assistant Chief George Saldamando, and Captain Glenn Breitenstein respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-50a) is reported at 356 F.3d 1108, (9th Cir. 2004). The decision of the district court (App., *infra*, 51a-69a) is not reported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered January 29, 2004. A timely Petition for Panel Rehearing and Rehearing En Banc was filed on February 12, 2004. The Petition was denied on March 22, 2004 (App., *infra*, 70a-71a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

1. The crux of this case concerns the fact that during the time when Respondent John Roe was employed by the San Diego Police Department he videotaped himself masturbating and offered the videotape for sale on the internet [eBay]. App., 32a. Although Roe falsely identified himself and used a Northern California address (App., 2a), he described himself in his seller's profile as being "in the field of Law Enforcement" (App., 32a) and his eBay user name [code3stud@aol.com] incorporated police jargon. App., 32a. Moreover, he was easily recognizable as the listing of items for sale included his picture. App., 32a.

2. Roe's outside activities came to light in July 2000, when Roe's supervisor, Sergeant Robert Dare, was searching eBay and discovered that a person with the user name of code3stud@aol.com was selling a tan uniform formerly used by the San Diego Police Department. App., 3a. When Sergeant Dare attempted to look for other items by the same seller, he was linked to an "adults only" section (App., 3a), where he had to "certify" that he did not find "pornographic images of nude adults, adults engaged in sexual acts or other sexual material to be offensive or objectionable." App., 32a-33a.

Sergeant Dare eventually got to the site where "Code3stud" was selling his wares and he was able to view photographs of the seller (Code3stud/Roe). Sergeant Dare immediately recognized the seller, as Sergeant Dare was "Code3stud/Roe's" supervisor at the time. App., 3a. Sergeant Dare printed out a number of the "items" that Code3stud/Roe was selling, and shared them with his lieutenant, Victoria Binkerd, and his captain, Defendant Glenn Breitenstein, who in turn contacted the San Diego Police Department's

Professional Standards Unit (hereinafter PSU). App., 3a.

The San Diego Police Department, through PSU, began an investigation of Code3stud/Roe's conduct of selling personal homemade videotapes and articles of clothing on eBay. The aforementioned videotapes depicted Roe alone, engaging in masturbation. App., 3a, 52a. Sergeant Alan Clark, in PSU, was provided with the materials that Sergeant Dare had compiled regarding the eBay items offered for sale by Code3stud/Roe. Thereafter, on or about July 21, 2000, Sergeant Clark, in an undercover capacity, purchased and received two items from Code3stud/Roe: 1) a pair of white men's briefs and 2) one of Code3stud/Roe's videotapes. App., 3a. On September 7, 2000, Sergeant Clark, again in an undercover capacity, asked Code3stud/Roe if he would make and sell a custom videotape for friend depicting the friend getting a ticket. Clark further requested that Code3stud/Roe "'strip down while writing the ticket and make [the friend] a deal to take it back, which would end up with [Roe's] masturbation.'" App., 33a. Plaintiff complied with the request and the videotape was sold to, and received by, Sergeant Clark. App., 3a. Thus, the production and sale of videotapes, and any conduct displayed therein, which forms the basis of Roe's First Amendment claim, were sold to the undercover San Diego Police Department officer investigating Roe.

On or about October 17, 2000, Roe was interviewed by Sergeant Clark regarding his involvement with the sale of videotapes and clothing on eBay. At that time, Roe admitted to the foregoing off-duty conduct. App., 4a. Thereafter, on November 30, 2000, Sergeant Clark completed his investigation into

Roe's conduct and prepared a report which concluded that Roe had violated three separate San Diego Police Department policies: Policy 9.06–Unbecoming Conduct; Policy 9.07--Immoral Conduct; and Policy 5.12–Outside Employment. App., 4a. On December 20, 2000, Captain Breitenstein issued an order to Roe, in which he was told to "'cease displaying, manufacturing, distributing or selling any sexually explicit materials or engaging in any similar behaviors, via the Internet, U.S. Mail, commercial vendors or distributors, or any other medium available to the public.'" App., 4a. In spite of the direct order, Roe maintained his eBay seller's profile (Code3stud@aol.com), which described the first two videos that Code3stud/Roe had produced, with the prices, as well as the price for a custom-made video. App., 4a. After discovering that Roe had not ceased his activities, Sergeant Dare prepared another report, on February 13, 2001, which concluded that Roe had violated a fourth Department Policy [9.04] which is Obedience to Lawful Orders and he recommended disciplinary action. App., 5a.

On March 29, 2001, Roe was served with a termination notice based upon his violation of the three SDPD Policies set forth above, as well as the Policy regarding obedience to lawful orders. App., 54a. Following an administration hearing, he was terminated on June 29, 2001. App., 55a.[1]

3. Roe filed his complaint in the Southern District of California on September 28, 2001, against the City of San Diego, the San Diego Police Department, Chief of Police David Bejarano, Assistant Chief of Police George Saldamando, and Captain Glenn

[1]There is nothing in the record to indicate that Roe appealed his termination to the City of San Diego Civil Service Commission.

Breitenstein in their official and individual capacities. App., 5a. His principal allegation was that he was terminated for making and selling pornographic videotapes, in violation of his First Amendment rights. App., 5a. The Complaint sought back pay with interest, compensatory, and punitive damages, reinstatement and an injunction prohibiting the City and the Department from taking further action against him. App., 5a. On November 21, 2001, the Petitioners filed a Motion to Dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. App., 5a.

4. The district court in its ruling (App., 51a-69a) noted that "[t]he first prong of the *Connick*[2] 'public concern' test, which as been applied by the Ninth Circuit in *Rendish*,[3] prevents a government employer from limiting speech by its employees relating to a 'public concern,' but otherwise allows limitations on speech." App., 61a. The district court also noted that to its knowledge, "neither the Supreme Court nor the Ninth Circuit has considered the issue of whether the government's right to limit the otherwise protected expression of its employees extends to a case in which a public employee (1) engages in nonverbal protected expression which is (2) neither at work nor about work." App., 61a. The district court concluded that the *Connick* "public concern" test, was the proper test to apply, as that "conclusion resonates with the policy considerations driving the *Connick* 'public concern' test, as expressed by the Supreme Court in *Connick*."

[2] *Connick v. Myers*, 461 U.S. 138 (1983)

[3] *Rendish v. City of Tacoma*,123 F.3d 1216, 1219 (9th Cir. 1997).

App., 63a. The district court stated that the Supreme Court had explained in *Connick*, 461 U.S. at 146, that:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.

App., 63a-64a.

Thus, the district court examined the content, form and context of the videotapes and granted the motion on December 20, 2001, holding that:

> Plaintiff has not shown how the production, marketing and sale of sexually explicit videos for commercial profit is a matter of public concern for purposes of the *Connick* 'public concern' test. Plaintiff in this case was not expressing anything related to the public affairs, commenting upon internal Department policies or procedures or even talking or litigating about work. The Court holds

> that Defendants have not acted to stifle the 'unfettered interchange of ideas for the bringing about of political or social changes.' *Connick*, 461 U.S. at [145] (*Roth v. United States*, 354 U.S. 476 (1957)."

App., 65a.

The Court granted Petitioners' motion to dismiss, with prejudice, "as the Court can see no way that Plaintiff can plead a cause of action which would not be barred by *Connick*." App., 65a.

5. Roe filed a timely notice of appeal on January 18, 2002. A divided panel of the court of appeals reversed.

a. In the portion of the its opinion discussing general legal principles, the majority began its reasoning by stating that "[i]n order to state a prima facie claim against a government employer for violation of the Free Speech Clause of the First Amendment, 'an employee must show (1) that he or she engaged in protected speech; (2) that the employer took "adverse employment action"; and (3) that his or her speech was a "substantial or motivating" factor for the adverse employment action.' *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003); see also *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 976 (9th Cir. 2002)." App., 6a. Additionally, the majority acknowledged that "[a] public employee's speech is protected only if the employee speaks 'as a citizen upon matters of public concern' rather than 'as an employee upon matters only of personal interest.' *Connick v. Myers*, [citation omitted]." Thereafter, the court inexplicably, and citing no authority whatsoever,

substituted the term "private grievance" and "personnel matter" for "personal interest" in analyzing this court's cases, as well as formulating and applying their new "public concern" test used in this case. Thus, the majority expanded protected speech to include any matter of personal interest, unless such speech concerned a private personnel matter. App., 25a. More importantly, the majority's new "public concern" test is backwards in that all speech is presumed protected unless it falls into the majority's very limited unprotected category. Not only does the majority's new test shift the burden of proof from the employee to the employer, but also it is contrary to the well established law that speech is only protected *when the employee is speaking on a matter of public concern*. By holding that "when the employee's speech is not about his government employer or employment, is directed to a segment of the general public and occurs outside the workplace, that speech satisfies the public concern test because such speech is not related to the employee's status in the workplace," (App., 21a), the majority established a new definition of the public concern test and effectively eradicated the threshold test set out in *Connick*.[4]

b. Turning to the facts of this case, the majority again acknowledged that "[i]n determining whether Roe's expressive conduct meets the public concern threshold, we consider the 'content, form, and context' of his speech. *Connick*, 461 U.S. at 147-48." App., 21a.

---

[4] "[W]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146 (1983).

As Judge Wardlaw pointed out in the dissent, prior to this case, the Ninth Circuit, like the other circuits, had consistently held that:

> "Content is the greatest single factor in the *Connick* inquiry." *Havekost v. United States Dep't of Navy*, [citation omitted]. See also *Weeks v. Bayer*, [citation omitted] ("First and foremost, we consider the content of the [public employee's] speech."). In this regard, we have consistently held that public employee speech is on a matter of public concern "if it helps citizens to make informed decisions about the operation of their government." *Roe v. City & County of San Francisco*, [citation omitted]; *McKinley v. City of Eloy*,[citation omitted]. Thus, where public employee speech is "of no relevance to the public's evaluation of the performance of governmental agencies, that speech ... receives no protection under the First Amendment." *Ulrich*, 308 F.3d at 978 (citing *Pool*, 297 F.3d at 907; McKinley, 705 F.2d at 1114).
>
> App., 37a.

However, in determining whether or not Roe's speech/conduct satisfied the *Connick* test, the majority did not use the well-established test as set out above. Rather, it only used its own new test, and thus limited its examination of the videotapes to determine whether or not the videotapes fell within the "unprotected

category of personnel disputes and grievances." App., 3a. Since the sexually explicit videotapes certainly did not concern a personnel dispute or grievance, were available to a member of the public, and were produced and sold outside the workplace, the majority concluded "the district court erred in dismissing his First Amendment claim without proceeding to *Pickering*[5] balancing." App., 25a.

c. Judge Wardlaw dissented. She correctly pointed out that "[t]he majority's new connect-the-dots public concern test flatly ignores the nature and content of the expressive conduct at issue in this case, and so dilutes the 'public concern' threshold for application of the *Pickering* balancing test as to read it out of existence." App., 31a. She also pointed out that:

> Although the majority purports to divine its sweeping new rule from *United States v. National Treasury Employees Union* ("NTEU "), [citation omitted], that case involved neither an adverse employment decision by the government as employer nor the public concern test. Because the majority's astonishing new rule disregards the content of public employee speech and blurs the distinction between the government's exercise of power as employer rather than sovereign, it directly contravenes the public employee speech doctrine developed in *Pickering v. Board of Education*, [citation omitted], *Connick v. Myers*, [citation omitted], and

[5]*Pickering v. Bd of Educ of Township High School Dist. 205, Will County, Ill.*, 391 U.S. 563 (1968).

> *Waters v. Churchill*, [citation omitted], as well as a host of Ninth Circuit cases defining the type of speech that rises to the level of "public concern."

App., 31a.

Judge Wardlaw also pointed out that "[i]t is the employee who bears the burden of demonstrating that '[his] speech was constitutionally protected--that it addressed a matter of public concern.' *Pool v. Vanrheen*, 297 F.3d 899, 906 (9th Cir. 2002). This threshold question is the only question the district court decided and the only question presented here." App., 34a. She also noted that "[a]lthough this threshold showing must be made in every public employee speech case, the majority treats it here as an alternative rather than a required approach. But the cases the majority references in its lengthy string-cite, ante, at 1119 n. 8, and elsewhere all make clear that a federal court may not resort to *Pickering* balancing until it first decides that the speech at issue is on a matter of public concern." App., 35a.

Judge Wardlaw further pointed out that the majority did not examine the content, form and context of the speech utilizing the traditional "public concern" test [as described in footnote 2 above], but rather, "contends that a new definition of the public concern test is warranted here because Roe's expressive conduct (purportedly) did not relate to his job and was not about personnel matters; occurred outside of work; and was 'directed to a segment of the general public.' Ante, at 1121- 1122." (App., 44a). Further, "[a]pplying its new test, the majority boldly concludes, without citing a single case, that speech is a matter of public

concern and *Pickering* balancing is required so long as the speech meets these criteria and "does not fall within an unprotected category of speech" under the First Amendment. Ante, at 1122." App., 44a.

Finally, Judge Wardlaw agreed that "Roe's purely private expressive conduct is protected by the First Amendment. The government could not enact a law prohibiting him from making and selling his videos. But under *Connick*, *Waters*, and the relevant SDPD employment regulations, if Roe wishes to be an officer in the SDPD, he is subject to termination for speech within the ambit of the First Amendment, but which does not involve a matter of public concern." App., 49a. However, "[t]he nature and content of Roe's speech determines whether Roe's termination is subject to First Amendment review." App., 49a. Since her examination of Roe's speech clearly showed that it "'cannot be fairly characterized as constituting speech on a matter of public concern, the First Amendment is inapplicable and the court need not scrutinize the reasons for any adverse actions.' *Ulrich*, 308 F.3d at 977-78 (citing *Connick*, [citation omitted]." App., 49a-50a. Therefore, she concluded that "[r]emand for analysis under *Pickering* or *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 [citation omitted] (1977), is therefore unwarranted, and I would affirm the district court." App., 50a.

REASONS FOR GRANTING THE PETITION

The district court correctly granted Petitioners' motion to dismiss, since "[t]o state a claim for unlawful retaliation in violation of the First Amendment, an employee must first demonstrate that the speech was 'on a matter of public concern.' *Connick*, . . Unless the speech meets this threshold requirement, [the court]

need not balance the employee's speech interest against the employer's interest in efficiency, see *Pickering* . . . , nor need [it] evaluate the causal relationship between the speech and the adverse employment action, see *Mt. Healthy* . . .'" *Weeks v. Bayer*, 246 F.3d 1231, 1234 (9th Cir. 2001). Roe's complaint clearly demonstrated that he could not state a First Amendment claim, as it is well established that "the State's interest in regulating the speech of its employees differs significantly from its interest in regulating the speech of its citizenry" and that "[t]o be protected by the First Amendment, a public employee's speech must involve a matter of public concern." *Rendish*, 123 F.3d at 1219.

In spite of the well established law concerning the public concern test, the majority relying upon an unprecedented extremely narrow interpretation of *Connick*, 461 U.S. at 146, concluded that "the purpose of the public concern test is to preempt a narrow category of claims involving speech related to a public employee's status in the workplace." App., 20a-21a. By interpreting the public concern test thusly, the majority has the test backwards and shifts the initial burden from the employee to the employer. Under the majority's newly defined test there is a presumption that all speech/conduct of a public employee is on a matter of public concern, unless the employer shows it comes within the narrow category of the "employee's status in the workplace." Contrary to other Circuit opinions, under the majority's definition, offensive or harassing speech[6] would satisfy the public concern test.

---

[6]For an example of the type of speech which would come under the protected definition of the majority, see *Trejo v. Shoben*, 319 F.3d 878, (7th Cir. 2003): "'Casual chit-chat between two persons or otherwise confined to a small group ... is not protected'

By stating the threshold public concern backwards, the majority only determined that Plaintiff's speech/conduct was not about his status in the workplace and thus, never examined the actual content of Plaintiff's speech/conduct to determine whether or not it was on a matter of public concern. *See Weeks*, 246 F.3d at 1234 [the "analysis of public concern is not an exact science."]. The Ninth Circuit in that case noted that "[f]ortunately, we have avoided rigid multi-part tests that would shoehorn communication into ill-fitting categories." *Weeks*, 246 F.3d at 1234. In other words, prior to this majority opinion, the Ninth Circuit has not engaged in the lengthy verbal gymnastics in order to determine whether or not the speech, or conduct, involved a matter of public concern. Instead, as the Ninth Circuit pointed out in *Weeks v. Bayer*, 246 F.3d at 1234-1235:

> Rather, guided by the Supreme Court, we have focused on two general aspects of speech that indicate whether a statement relates to a matter of public concern. First and foremost, we consider the content of the speech. . . .Put slightly differently, "matter[s] of political, social, or other concern to the community" are protected. *Gillette v. Delmore*, [cite omitted]. . . . By contrast, this doctrine does not safeguard "purely private interest[s]," . . .
>
> In addition to examining the content of the speech, we also consider its "form[] and context." *Connick*, [cite omitted]. Thus, we look to such factors as the public or private nature of the speech, *id.* at 148, 103 S.Ct. 1684, and the speaker's motive, *Havekost*, 925 F.2d at 318. Although these factors must not be used as litmus tests, *Berg v. Hunter*, [cite omitted]--after all, even a private complaint may relate to a matter of public concern, *Givhan v. W. Line Consol. Sch. Dist.*, [cite omitted]--they help to identify speech that is of public concern, particularly in close cases, *Johnson*, 48 F.3d at 425.

The majority's redefinition conflicts with all of the previous Ninth Circuit cases, which have consistently held that "[t]o be protected by the First Amendment, a public employee's speech must involve a matter of public concern." *Rendish*, 123 F.3d at 1219. Further, when "speech involved only personal concerns, . . . [the Plaintiff] failed to show his conduct was constitutionally protected." *Gearhart v. Thorne*, 768 F.2d 1072, 1073 (9th Cir. 1985). Furthermore, the majority opinion fails to recognize the distinction between government as employer and government as regulator. For thirty years, the United States Supreme Court, and the lower federal courts, have reiterated the decision in *Pickering*, which held that "the State has

---

under the First Amendment. *Swank*, 898 F.2d at 1251. Thus, the off-color comments Trejo made while he was attending parties, playing cards, or frequenting taverns around the University--such as his comment that he wanted to 'get his hands' on one graduate student and 'get naked' or 'drink some good beer' with another--is casual, idle, and flirtatious chit-chat that may not form the basis of a First Amendment claim." *Trejo*, 319 F.3d at 887.

interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 U.S. at 568.

1. All of the appellate courts, including the Supreme Court, have recognized that in the literal sense of the term, if a government employee alleges that he or she was terminated by a government entity; then that is "governmen. activity." Thus, if a Plaintiff claimed that he was terminated for something that he said, then that allegation could be "construed" as stating that "government activity" had violated the employee's "free speech rights." In order for the federal courts to avoid being the supreme "Civil Service Commission," the Supreme Court, as well as the Ninth Circuit, has developed a balancing test to determine when a government employee's termination violates the First Amendment. The Supreme Court has emphasized that, "absent highly unusual circumstances, a federal court is not the appropriate forum for reviewing a public employer's reaction to an employee's speech when the employee did not speak as a citizen on a matter of public concern." *Connick*, 461 U.S. at 147.

2. The Supreme Court, recognizing that the "government" is an employer, as well as a legislator and enforcer of the laws, made it clear, in *Pickering*, that a public employee's free speech rights had to be circumscribed by the government's legitimate interest in "promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. Subsequently, in *Connick*, 461 U.S. 138 (1983), the Supreme Court held that an employee who sought to recover damages on the ground that he was disciplined because of his exercise of his free speech rights had to initially establish that his speech could be

"fairly characterized as constituting speech on a matter of public concern." In *Rendish*, 123 F.3d at 1220-21, the Ninth Circuit examined, at length, why the public employee had to first establish that his speech was on a matter of public concern, in order to claim retaliation for exercising his free speech rights. The Court initially noted that "in delineating the scope of a public employee's constitutional rights, the Supreme Court has focused on the fundamental design of the First Amendment-to foster participation in the interchange of political and social ideas." The Court then examined the purpose behind that fundamental design:

> In *Connick*, the Supreme Court reviewed the historical evolution of the rights of public employees, noting that it had gradually recognized the First Amendment rights of such employees to participate in public affairs without suffering retaliatory employment actions.
>
> In all of these cases, the precedents in which *Pickering* is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs. The issue was whether government employees could be prevented or "chilled" by the fear of discharge from joining political parties and other associations that

certain public officials might find "subversive." The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Connick, 461 U.S. at 144-45, 103 S.Ct. at 1688-89 (citations omitted). The Court noted that it has "frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Id.* at 145, 103 S.Ct. at 1689 (citation omitted). This comes as no surprise, because at the center of the Court's concern was ensuring that public employees maintain their right to participate in the "free and open debate [which] is vital to informed

decision-making by the electorate." *Id.* (quoting *Pickering*, 391 U.S. at 571-72, 88 S.Ct. at 1735-36).

Rendish, 123 F.3d at 1220-21.

The Ninth Circuit, in *Roe v. City and County of San Francisco*; 109 F.3d 578, 585 (9th Cir. 1997) reiterated the oft-cited rule that:

> [I]f the communication is essentially self- interested, with no public import, then it is not of public concern. Indeed, if the speech concerns information only of personal interest, "a federal court is not the appropriate forum" in which to review the public agency reaction "absent the most unusual circumstances." *Connick v. Myers*, [cite omitted].
>
> Unlike the majority in this case, *Tucker* did not redefine the "public concern" requirement, to include all speech except a private grievance. Rather, it reiterated that government employers cannot restrict workplace speech and that, unless the speech is limited to just a private grievance, it is generally constitutionally protected.

Further, the "private grievance" or "private concern" doctrine evolved to prevent public employees from asserting that the "public concern" requirement is

met satisfied merely the public employee speaking about matters concerning his or her public employment, or speaking at work. As the Court in *Pappas v. Giuliani*, 118 F. Supp. 2d 433, 444 (S.D.N.Y. 2000) pointed out:

> *Connick* made clear that courts must look behind pretextual "public concern" rationales proffered by plaintiffs and attempt to discern whether their conduct, taken as a whole, was actually meant to address matters of public concern or was simply a vehicle for furthering private interests. [n10] See *Connick*, [cite omitted]; . . . Rather, we "must instead delve deeper into the precise content, form, and context of speech that admittedly may be of some interest to the public." (citing *Cliff v. Board of Sch. Comm'rs of City of Indianapolis*, [cite omitted]).

2. Since a public employee must first establish that his speech or non-verbal conduct was a matter of public concern, before the government entity had to justify the discipline for the speech or non-verbal conduct, the Ninth Circuit, as well as a number of other circuits have continually held, as the district court did in this case, that the public concern requirement is the threshold inquiry in any case in which a public employee claims that he or she was terminated in violation of his or her free speech rights. The Ninth Circuit clearly set out the test as follows:

> In reviewing a claim of retaliation for the exercise of constitutionally-protected rights, we must consider: 1) *whether the plaintiff was engaged in an activity that is entitled to constitutional protection*; 2) whether her exercise of the constitutionally-protected right was a "substantial" or "motivating" factor in the defendant's action; and 3) whether the defendant has established that it would have taken the same action in the absence of the protected conduct.[1] [Footnote in case] *Gillette v. Delmore*, [citation omitted] . . . ; see *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir.1989). [Emphasis added.]

Rendish, 123 F.3d at 1219.

Indeed, as pointed out, not had the Ninth Circuit continually held that the public concern requirement is a threshold requirement, but also the other circuits: *Heil v. Santoro*, 147 F.3d 103, 110 (2nd Cir. 1998) ["A public employee who seeks to recover on the ground that he has been disciplined because of the exercise of First Amendment rights must establish, as an initial matter, that his speech may be 'fairly characterized as constituting speech on a matter of public concern.'"]; *Caine v. Hardy*, 943 F.2d 1406, 1415 (5th Cir. 1991), on a Federal Rule of Civil Procedure 12(b)(6) motion ["The threshold legal question in such cases is whether the employee's speech dealt with matters of truly public concern as opposed to matters of purely personal interest or intra-office disputes. *Connick v. Myers*, [citation omitted]."]; *Tyler v. City of Mountain Home*,

72 F.3d 568, 570 (8th Cir. 1995) ["First, the court must determine whether the speech at issue can be 'fairly characterized as constituting speech on a matter of public concern.'"]; *Pappas*, 118 F. Supp.2d at 444 ["In order to prevail, Mr. Pappas must first establish that his conduct amounted to speech on a matter of 'public concern.'"].

Thus, the district court correctly dismissed this case, with prejudice, as Roe could not establish that his conduct amounted to speech on a matter of public concern.

4. As Judge Wardlaw pointed out at length in her dissent, an examination of Roe's speech/conduct clearly demonstrates that it did not meet the threshold public concern test. Federal courts in several jurisdictions, addressing cases where the plaintiff's speech was not about the workplace, nor occurred in the workplace, utilized the traditional *Connick* "public concern" test, to determine whether or not the plaintiff had met his or her threshold inquiry. Last year, the Seventh Circuit, in *Trejo v. Shoben*, 319 F.3d 878 (7th Cir. 2003), addressed such a case. Trejo, a college professor, claimed that the University had violated his right to freedom of speech by not renewing his teaching appointment. *Trejo*, 319 F.3d at 884. The University had refused to renew the appointment after finding that the Plaintiff had engaged in the following speech/conduct while off campus: (1) he telephoned a student in the middle of the night, concealed his identity, impersonated another student, and asked her to play cards with him; (2) he told a Wichita State University professor that he and the professor should "go to the president's party and see if we can find some women to bring back" to their hotel room; (3) he made sexual comments to female students that "we're going

to quit playing cards or we're all going to get naked and go to bed!" and (4) he attempted to solicit dates from graduate students. *Trejo*, 319 F.3d at 886-7.

The Seventh Circuit, after a detailed examination of the content and context of Trejo's speech/conduct concluded that:

> We reject Trejo's argument, for we are convinced that while Trejo's complaint alleges that he engaged in expressive activity protected by the First Amendment, the facts in this record conclusively establish that his speech was related to matters of private concern and thus cannot form the basis of a constitutional challenge. See *Connick v. Myers*, [citation omitted]; *Pickering v. Board of Educ.*, [citation omitted].

Trejo, 319 F.3d at 884.

The Eighth Circuit in *Tindle v. Caudell*, 56 F.3d 966 (8th Cir. 1995) came to the same conclusion after examining a police officer's conduct at a private party. Tindle, a police officer, attended a costume party, while off-duty, and for reasons known only to Tindle, came "dressed in blackface, wearing bib overalls and a black, curly wig, and carrying a watermelon." *Tindle*, 56 F.3d at 968. Other officers who attended the party were offended and after an investigation, Tindle was suspended for thirty days. *Tindle*, 56 F.3d at 968. Tindle brought an action contending that "his suspension violated the First Amendment because wearing a costume is a form of entertainment, which is protected expression, and a material fact issue exists as

to whether his conduct caused an actual disruption in the police force." *Tindle*, 56 F.3d at 969.

As in this case, Tindle did not claim to be commenting on any particular issue, rather he argued that he was engaged in entertainment, so as to come within the opinion expressed in *Berger v. Battaglia*, 779 F.2d 992 (4th Cir.1985). *Tindle*, 56 F.3d at 970. The Court, at page 870, rejected Tindle's argument, as well as his reliance upon *Berger*:

> Amusing other guests at a private party with no showing of any intended message is not speech on a matter of public concern. Tindle's reliance on *Berger v. Battaglia*, [cite omitted] is misplaced. In that case, an off-duty police officer regularly performed a musical show in public in which he sang and played various instruments. . . .the performances were a "form of artistic expression," . . .and were of interest to the public that attended and sometimes paid to see and hear them. . . . Artistic expression before a public audience is quite different from a decision to wear a costume to a private Halloween party. Here there were no public performances, and there is little in the record to suggest there was much entertainment value in Tindle's appearance.

The only difference between Tindle and Roe is that Roe videotaped his activity and mailed to a person who turned out to be an undercover police officer. Tindle argued, in the alternative, that the "public concern"

test did not fit the situation, when an employee claims that he was disciplined for conduct which did not take place at work and was not about work. *Tindle*, 56 F.3d at 970. As in this case, Tindle asked the Court to change the threshold question from whether or not his actions constituted speech on a matter of public concern, to whether or not he had engaged in "protected expression." *Tindle*, 56 F.3d at 970-971. Whereas it is true that the Eighth Circuit found that it did not have to depart from the "normal Connick test" given the fact that Tindle had worn the costume to the police lodge [*Tindle*, 56 F.3d at 971], the Court went on to state that the "application of the protected expression test would not change the outcome." *Tindle*, 56 F.3d at 971.

Like Tindle, Roe's complaint only alleges that he was engaged a very private activity, by himself, which was memorialized on videotape.

In *Lawrenz v. James*, 852 F. Supp. 986, 988-9 (M.D. Fla. 1994), a correction officer, who was terminated for wearing a White-Power T-Shirt to a private party on Martin Luther King Day, alleged that his termination violated his First Amendment rights. The Court agreed with the government's contention that the issue was not whether the wearing of the White Power T-Shirt was abstractly entitled to First Amendment protection, but whether or not the Plaintiff was wearing it as an expression of public concern. *Lawrenz*, 852 F. Supp. at 992. The Court concluded that wearing the shirt was not a matter of public concern, and, what is more important, "[a]bsent extraordinary circumstances, in cases where a government employee challenges his or her termination on First Amendment grounds, if the employee cannot demonstrate that the subject expression was a matter of public concern, the

defect is fatal to the action, . . ." *Lawrenz*, 852 F. Supp. at 991.

In *Harper v. Crockett*, 868 F. Supp. 1557, (E.D.Ark. 1994), an off-duty police officer [Harper] got into an argument with a bank teller, when she refused to cash his tax refund check. Thereafter, Harper lost his temper and told a customer: "Just wait until the next time they're getting robbed and I'm the first one in getting shot at. That's my job you know, I am a policeman." After Mr. Harper was disciplined for his off-duty conduct, he brought suit asserting that his speech was protected by the First Amendment. *Harper*, 868 F. Supp. at 1563. The district court first held that "[i]f the speech is not a matter of public concern, the Court does not reach the second, "balancing" step of the inquiry." *Harper*, 868 F. Supp. at 1564. The Court recognized that Plaintiff's "speech" did not fit the usual *Pickering/Connick* mold. Nevertheless, in spite of the fact that Harper contended that his comments were intended to remark upon federal banking policy and related issues which were before Congress, the District Court had no problem concluding that "[i]n applying the Connick "public concern" analysis to the case at bar, it is clear that Mr. Harper's speech focused on a personal quarrel and was not a matter of public concern." *Harper*, 868 F. Supp. at 1569.

Lastly, the District Court in *Pappas v. Giuliani*, 118 F. Supp. 2d 433 (S.D.N.Y. 2000) also addressed conduct outside of the workplace and unrelated to work. Pappas did not mail a videotape to an undercover officer, rather he mailed anti-Semitic and anti-black literature to an undercover officer. Pappas, who was a member of several "white power" groups, did not like receiving solicitation requests from any organization

which did not subscribe to his narrow view of the world and thus, would return reply envelopes with anti-Semitic and anti-black literature. After a sting operation by N.Y.P.D and an administrative hearing, Pappas was dismissed for disseminating defamatory material through the mail, conduct that was prohibited by the N.Y.P.D. Patrol Guide. *Pappas*, 118 F.Supp.2d at 437. Pappas contended that his conduct was speech that was protected by the First Amendment. Even though the conduct was off-duty and not related in any fashion to the plaintiff's employment, the Court held that "[a] public employee seeking to recover on the ground that he has been disciplined because of his exercise of his First Amendment rights must initially establish: (1) that his speech may be "fairly characterized as constituting speech on a matter of public concern," . . ." *Pappas*, 118 F.Supp.2d at 433. The Court found that Pappas' activities were not entitled to First Amendment protections, reasoning that "[t]he record makes evident that Mr. Pappas intended to convey no message of 'public concern' in his mailings to solicitors, he simply wanted to dissuade charities from soliciting money from him by offending them with racist mailings." *Pappas*, 118 F.Supp.2d at 445. In fact, the Court concluded, that "his conduct amounted to private interest dressed in public garb and was entitled to no greater First Amendment protection than the assistant district attorney's survey in Connick." *Pappas*, 118 F.Supp.2d at 445.

Likewise, to the degree that Roe's conduct could be deemed "expressive," it did not bear on a matter of "public concern," and therefore his termination could not have been in violation of his free speech rights. When one actually examines the content and context of Roe's speech/conduct, just as the dissent did in this case

and the aforementioned courts in the above cited cases did, it is clear that conduct such as Roe's does not meet the threshold Connick public concern test.

5. The Supreme Court's decision in *United States v. NTEU*, 513 U.S. 454 (1995) does not support the majority's opinion. The majority asserted that its new test is rooted in the Supreme Court's holding in *United States v. National Treasury Employees Union* ("*NTEU*"), 513 U.S. 454 (1995) (App., 17a-19a). However, that case did not involve an adverse employment decision by a government employer, nor the reworking of the public concern test. Further, it is instructive to determine why *NTEU*, when applying the *Connick* test, concluded that the Respondents were within the "protected category of citizen comment on matters of public concern." *NTEU*, 513 U.S. at 466. As Judge Wardlaw points out in her dissent, "[n]ot surprisingly, the government never sought to defend the statute against the employees' First Amendment challenges on the ground that these speech activities did not involve matters of public concern. Accordingly, the Court never expressly reached the issue, implicitly finding the speech activities on matters of public concern and proceeding to evaluate the statutory ban under a Pickering balancing test. 513 U.S. at 464-72." App., 45a-46a. Indeed, the *content and the context* of the speeches clearly demonstrated speech which met the public concern test:

> The record contains a number of affidavits describing respondents' past activities that the honoraria ban would now prohibit. A mail handler employed by the Postal Service in Arlington, Virginia, had given lectures on the

> Quaker religion for which he received small payments that were "not much, but enough to supplement my income in a way that makes a difference." *Id.*, at 47. An aerospace engineer employed at the Goddard Space Flight Center in Greenbelt, Maryland, had lectured on black history for a fee of $100 per lecture. *Id.*, at 63. A microbiologist at the Food and Drug Administration had earned almost $3,000 per year writing articles and making radio and television appearances reviewing dance performances. *Id.*, at 77. A tax examiner employed by the Internal Revenue Service in Ogden, Utah, had received comparable pay for articles about the environment. *Id.*, at 67.
>
> *NTEU*, 513 U.S. at 461.

Applying the *Pickering/Connick* test, the Court had no difficulty concluding that the "Respondents' expressive activities *in this case* [emphasis added] fall within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace." The Court also noted that the foregoing speeches "were addressed to a public audience." *NTEU*, 513 U.S. at 466. The Court's ruling in *NTEU* illustrates why the Ninth Circuit had previously consistently reiterated the rule that, "if the speech concerns information only of personal interest, 'a federal court is not the appropriate forum' in which to review the public agency reaction 'absent the most

unusual circumstances.'" *Roe v. City and County of San Francisco*; 109 F.3d at 585 (9th Cir. 1997). Thus, it is clear that the majority erred by not examining the content and context of Plaintiff's speech/conduct, to determine if it met the threshold public concern test. If they had, the only conclusion could have been that the making and selling of the videotapes was unprotected activity.

CONCLUSION

The petition for writ of certiorari should be granted and the Court should summarily reverse on the grounds that Roe's speech did not meet the public concern test and thus, he cannot show that his speech was protected.

In the alternative, the Court should reverse and remand to the Court of Appeal, with instructions to apply the appropriate legal standard and analysis in regard to Roe's complaint for a violation of his First Amendment rights.

Respectfully submitted,

PENNY LEA CASTLEMAN
Counsel of Record
OFFICE OF CITY ATTORNEY
1200 3rd Ave
Suite 1100
San Diego, CA 92101
(619) 533-5834
Attorney for Petitioners

(Any footnotes trail end of each document)

No. 02-55164

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ROE,
Plaintiff-Appellant,

v.

CITY OF SAN DIEGO; SAN DIEGO CITY POLICE DEPARTMENT; DAVID BEJARANO; GEORGE SALDAMANDO; GLENN BREITENSTEIN,
Defendants-Appellees.

February 4, 2003, Argued and Submitted,
Pasadena, California
January 29, 2004, Filed

COUNSEL: Michael P. Baranic, Gattey Cooney & Baranic LLP, San Diego, California, for the plaintiff-appellant.

Penny L. Castleman, Deputy City Attorney, San Diego, California, for the defendants-appellees.

JUDGES: Before: Dorothy W. Nelson, Kim M. Wardlaw and Raymond C. Fisher, Circuit Judges. Opinion by Judge Fisher; Dissent by Judge Wardlaw.

OPINION BY: Raymond C. Fisher

OPINION: FISHER, Circuit Judge:

Plaintiff-Appellant John Roe, n1 while a San Diego police officer, videotaped himself stripping off a generic police officer's uniform and engaging in acts of masturbation. He offered these homemade videos for sale on the adults-only section of the popular online auction site eBay, using a fictitious name and a Northern California address. Although the videos did not reveal his connection with the San Diego Police Department (the "Department"), Roe was unmasked when one of his supervisors discovered the videos online and recognized Roe's picture. The Department confronted Roe, who readily admitted making and selling the videos, and eventually fired him. Roe sued the Department, the City of San Diego and his supervisors in federal district court under 42 U.S.C. § 1983, alleging that his off-duty, non-work-related activities were protected by the First Amendment and could not be grounds for terminating his employment. The district court dismissed Roe's claim, concluding that the videos did not address a matter of "public concern," and thus the Department did not violate Roe's constitutional rights by firing him. We conclude that the district court erred, and reverse and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUNDn2

Roe was employed as a City of San Diego police officer for more than seven years. He was fired after the San Diego Police Department discovered that he was selling sexually explicit, non-obscene videos on the adults-only section of eBay. The videos depict Roe alone, with his face partially masked, taking off a generic police uniform and masturbating.

The Department became aware of Roe's activities on eBay through the following sequence of events. In July 2000, Roe's supervisor, Sergeant Robert Dare, searched eBay and located a tan uniform formerly used by the San Diego Police Department. The uniform was offered for sale by a person with the eBay username "Code3stud@aol.com."

Sgt. Dare searched eBay for other items offered for sale by Code3stud and discovered there were such items in eBay's adults-only section. After complying with eBay's access requirements, Sgt. Dare entered the adults-only section and viewed the listings for the items offered by Code3stud. Some of the listings contained Code3stud's picture, and Sgt. Dare recognized the man pictured as Roe.

Sgt. Dare printed out some of the listings and shared them with other supervisors in Roe's chain of command, including Captain Glenn Breitenstein. Capt. Breitenstein contacted the Department's Professional Standards Unit ("PSU"), which began an investigation into Roe's activity on eBay. On July 21, 2000, an undercover PSU investigator, Sergeant Alan Clark, purchased two items from Code3stud: a pair of white men's briefs and a videotape depicting Roe engaging in masturbation. On September 7, Sgt. Clark, again acting undercover, asked Code3stud to produce a custom-made videotape depicting Code3stud issuing another man a citation and then masturbating. Code3stud agreed, produced the video and sold it to Sgt. Clark.

All aspects of the production and sale of the videotapes were conducted while Roe was off-duty and away from his employer's premises and did not involve the use of

any City or Department resources. None of the items Roe offered for sale identified Roe as an employee of the City or Department or as being affiliated with them in any way. He never identified himself by name in any sale or listing, and he never identified himself as a San Diego Police officer. He described himself in his eBay seller's profile as living in "Northern California" and being "in the field of law enforcement." He directed all payments to "S. Shatswell," a fictitious name, and utilized a post office box address in Northern California. There is no evidence that Code3stud's real identity was ever discovered by anyone other than Sgt. Dare and the other police officers involved in the investigation.

On October 17, 2000, Sgt. Clark interviewed Roe in person about his sale of videos and clothing on eBay. Roe readily admitted to the off-duty conduct. Sgt. Clark completed his investigation on November 30 and concluded that Roe had violated three Department policies: Policy 9.06 -- Unbecoming Conduct, Policy 9.07 -- Immoral Conduct, and Policy 5.12 -- Outside Employment. On December 20, 2000, Capt. Breitenstein ordered Roe "to cease displaying, manufacturing, distributing or selling any sexually explicit materials or engaging in any similar behaviors, via the internet, U.S. Mail, commercial vendors or distributors, or any other medium available to the public."

Roe removed all items he had listed for sale on eBay but did not change his seller's profile, which described the first two videos he had produced and listed their prices, as well as the price for a custom-made video. On February 13, 2001, Sgt. Dare submitted a report

concluding that Roe had violated a fourth Department Policy 9.04 -- Obedience to Lawful Orders -- and recommended disciplinary action. After providing Roe with notice and a hearing, the Department terminated Roe's employment on June 29, 2001 for violation of all four Department policies. There is no evidence in the record that Roe's job performance was unsatisfactory; his final performance evaluation, covering January 7 to April 27, 2001, indicates that he met expectations and received one letter of commendation.

On September 28, 2001, Roe brought suit under 42 U.S.C. § 1983, alleging that he was terminated principally for the content of his videos in violation of his constitutional right to freedom of speech. n3 Roe sued the City and the Department, as well as Chief of Police David Bejarano, Assistant Chief of Police George Saldamando and Capt. Breitenstein in their official and individual capacities. Roe seeks back pay with interest, compensatory and punitive damages, reinstatement and an injunction prohibiting the City and Department from taking further punitive actions against him.

On November 16, 2001, the defendants moved to dismiss Roe's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The district court granted the motion on December 20, 2001 because it determined that Roe's speech did not touch on a matter of "public concern." Roe filed a timely notice of appeal on January 18, 2002, challenging the dismissal of his First Amendment claim.

II. STANDARD OF REVIEW

Dismissals for failure to state a claim under Rule 12(b)(6) are reviewed de novo. Zimmerman v. City of Oakland, 255 F.3d 734, 737 (9th Cir. 2001). We must accept as true all well-pleaded allegations of fact in the complaint and construe them in the light most favorable to the plaintiff. Id. "Dismissal for failure to state a claim is appropriate if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (internal quotation marks omitted). Whether a government employee's speech is a matter of public concern is a question of law that we review de novo. Nunez v. Davis, 169 F.3d 1222, 1226 n.1 (9th Cir. 1999).

III. DISCUSSION

In order to state a prima facie claim against a government employer for violation of the Free Speech Clause of the First Amendment, "an employee must show (1) that he or she engaged in protected speech; (2) that the employer took 'adverse employment action'; and (3) that his or her speech was a 'substantial or motivating' factor for the adverse employment action." Coszalter v. City of Salem, 320 F.3d 968, 973 (9th Cir. 2003); see also Ulrich v. City & County of San Francisco, 308 F.3d 968, 976 (9th Cir. 2002). A public employee's speech is protected only if the employee speaks "as a citizen upon matters of public concern" rather than "as an employee upon matters only of personal interest." Connick v. Myers, 461 U.S. 138, 147, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983).

Once the employee has made a prima facie claim, the burden shifts to the public employer to demonstrate

either that, under the balancing test established by Pickering v. Bd. of Educ., 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), the employer's legitimate administrative interests outweigh the employee's First Amendment rights or that, under the mixed motive analysis established by Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977), the employer would have reached the same decision even in the absence of the employee's protected conduct. See Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 675-76, 135 L. Ed. 2d 843, 116 S. Ct. 2342 (1996); Ulrich, 308 F.3d at 976-77.

Only the first element of the employee's prima facie case -- the public concern test -- is at issue here. The district court dismissed Roe's case because it ruled that his speech did not touch on a matter of "public concern." Although there is a well-developed constitutional jurisprudence that addresses the meaning of "public concern," that jurisprudence has typically focused on employee speech that takes place at work or that addresses the policies of the government employer. Here, we deal with videos that were made and sold outside the workplace and said nothing about the employer or any government agency. We therefore must decide whether such off-duty, non-work-related speech receives qualified protection under the public concern test. n4

We are not the first court to confront this question. In United States v. National Treasury Employees Union ("NTEU"), 513 U.S. 454, 130 L. Ed. 2d 964, 115 S. Ct. 1003 (1995), the Supreme Court held that government employees' "expressive activities" that "were addressed to a public audience, were made outside the

work-place, and involved content largely unrelated to their government employment" fell "within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace." Id. at 466. Similarly, Roe's expressive activities -- as crude as they may appear -- were directed at a "segment[ ] of the general public" and did not have "any relevance to [his] employment." Id. at 465. As we explain in greater detail below, we therefore hold that Roe's expressive conduct falls within the protected category of citizen comment on matters of public concern, rather than employee comment on matters related to his personal status in the workplace.

Consequently, Roe's First Amendment claim must be resolved under Pickering balancing by weighing the free speech interests at stake against the Department's legitimate interests as an employer in promoting the efficiency of the public services it performs. See id. at 466; Umbehr, 518 U.S. at 676. Alternatively, the Department can prevail under Mt. Healthy's mixed motive analysis if it can prove by a preponderance of the evidence that it would have terminated Roe regardless of his speech. See Mt. Healthy, 429 U.S. at 287; Umbehr, 518 U.S. at 685. Because the district court did not reach the Pickering balancing test or the Mt. Healthy mixed motive analysis, we remand the case to the district court for further proceedings.

A.

The First Amendment, made applicable to the states by the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech."

U.S. Const. amend. I. Although "as a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,'" Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983), some kinds of speech receive no protection at all from government intrusion. The categories of unprotected speech include child pornography, New York v. Ferber, 458 U.S. 747, 763-64, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982); imminent incitement, Brandenburg v. Ohio, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969); true threats, Watts v. United States, 394 U.S. 705, 707-08, 22 L. Ed. 2d 664, 89 S. Ct. 1399 (1969) (per curiam); obscenity, Roth v. United States, 354 U.S. 476, 483-85, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957); libel, Beauharnais v. Illinois, 343 U.S. 250, 266, 96 L. Ed. 919, 72 S. Ct. 725 (1952); and fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73, 86 L. Ed. 1031, 62 S. Ct. 766 (1942).

Within the broad realm of protected expression, the level of protection varies depending on the subject matter of the speech. The Supreme Court "has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." Connick, 461 U.S. at 145 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982), and citing Carey v. Brown, 447 U.S. 455, 467, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980)); see also First Nat'l Bank v. Bellotti, 435 U.S. 765, 776, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978) (noting that speech on governmental affairs lies "at the heart of the First Amendment's protection"). This is because "the protection given speech . . . was fashioned

to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957). "Speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75, 13 L. Ed. 2d 125, 85 S. Ct. 209 (1964).

Other kinds of speech, such as commercial speech and some kinds of entertainment, occupy subordinate positions in the hierarchy but are still entitled to some protection. See, e.g., City of Erie v. Pap's A.M., 529 U.S. 277, 289, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000) (plurality opinion) (nude erotic dancing); Florida Bar v. Went For It, Inc., 515 U.S. 618, 623, 132 L. Ed. 2d 541, 115 S. Ct. 2371 (1995) (commercial speech). Sexually explicit entertainment that is not obscene and that does not involve children falls within the ambit of the First Amendment. See, e.g., Ashcroft v. Free Speech Coalition, 535 U.S. 234, 240, 152 L. Ed. 2d 403, 122 S. Ct. 1389 (2002) ("virtual child pornography").

If Roe were simply a member of the general public rather than a public employee, there is no doubt that his sexually explicit but not obscene videos would be entitled to some measure of First Amendment protection against government censure. The question we face here is whether Roe's status as a public employee means he has no First Amendment protection even though his expressive conduct occurred off-duty, away from the workplace and said nothing about Roe's government employment or employer. We conclude that Roe's expressive conduct retains a qualified First Amendment protection under the public concern test.

B.

To aid in understanding the public concern test and its application here, we first review the test's origins and evolution. For roughly the first half of the twentieth century, it was "unchallenged dogma . . . that a public employee had no right to object to conditions placed upon the terms of employment -- including those which restricted the exercise of constitutional rights." Connick, 461 U.S. at 143-44 (citing five Supreme Court cases decided between 1882 and 1952). Justice Holmes' classic epigram, written while he served on the Supreme Judicial Court of Massachusetts, aptly expresses this view: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517, 517 (Mass. 1892). During the 1950s and early 1960s, however, that dogma began to change. In a series of cases, the Supreme Court recognized that public employees could not be required as a condition of employment to swear oaths of loyalty to the state and reveal the groups with which they associated. See Connick, 461 U.S. at 144 (citing six Supreme Court cases decided between 1952 and 1963).

Building on these cases, the Supreme Court recognized in its 1968 Pickering decision that government retaliation against public employees for engaging in protected speech can violate the First Amendment. Pickering, 391 U.S. at 574-75. The Court held unconstitutional the dismissal of a public high school teacher for sending a letter to a local newspaper criticizing the board of education for, among other things, its allocation of school funds between

educational and athletic programs. Id. at 569. Pickering established a balancing test whereby "the interests of the [employee], as a citizen, in commenting upon matters of public concern," are weighed against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 568.

Fifteen years later in Connick, the Supreme Court elaborated on the meaning of "public concern." 461 U.S. at 146. That case involved a free speech claim brought by an assistant district attorney who was terminated after she had distributed a questionnaire to her fellow staff members concerning "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." Id. at 141. The plaintiff circulated the questionnaire after objecting strongly to the district attorney's decision to transfer her to a different part of the criminal court. Id. at 140. Rather than apply the Pickering balancing test initially, the Supreme Court held that the balancing test is to be preceded by a threshold inquiry implicit in Pickering itself:When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147 (emphasis added).

The Court's purpose in imposing the threshold public concern test was to avoid the constitutionalization of

common workplace grievances between public employers and employees. See id. at 149. The Court took the view "that government offices could not function if every employment decision became a constitutional matter." Id. at 143.To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark -- and certainly every criticism directed at a public official -- would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.Id. at 149. The public concern test was thus intended to weed out claims in which an adverse employment action is taken against an employee for complaining about internal office affairs, such as the employee's conditions of employment or job status. See id.

The Supreme Court did not articulate a precise definition of "public concern" but concluded that an employee's job-related speech touches on a matter of public concern when it is relevant to the public's evaluation of the government employer's performance. See id. at 148. Thus, an employee's attempt to "bring to light actual or potential wrongdoing or breach of public trust" on the part of the government employer constitutes a matter of public concern, id., as does an employee's public criticism of the policy choices made by the government employer, such as the allocation of funds, see Pickering, 391 U.S. at 569-70.

The Court in Connick held that only the last of the issues addressed in the plaintiff's questionnaire --

whether employees were being pressured to work on political campaigns on behalf of office-supported candidates -- touched on a matter of public concern. Connick, 461 U.S. at 149. The other topics -- office transfer policy, office morale, the need for a grievance committee and the level of confidence in supervisors -- were, in the Court's view, "mere extensions of [the plaintiff's] dispute over her transfer" that were thus not "of public import in evaluating the performance of the District Attorney." Id. at 148. The Court therefore applied Pickering balancing to the last issue on the questionnaire.

Since Connick, the typical public concern case has "invariably involved some form of criticism or questioning of the public employer's policy, or of its specific actions, or of supervisory personnel expressed either privately to the employer or publicly." Berger v. Battaglia, 779 F.2d 992, 997 (4th Cir. 1985) (footnotes omitted). Waters v. Churchill, 511 U.S. 661, 128 L. Ed. 2d 686, 114 S. Ct. 1878 (1994), for example, involved an obstetrics nurse who was allegedly fired for comments she made to a coworker criticizing the obstetrics department. Id. at 664-65. Board of County Commissioners v. Umbehr, 518 U.S. 668, 135 L. Ed. 2d 843, 116 S. Ct. 2342 (1996), concerned an independent contractor whose government contract was allegedly terminated because he criticized the county and the board of commissioners. Id. at 671. The protected status of such speech turns on "whether the public employee was merely complaining privately about matters personal to himself, such as whether he was being paid enough or given deserved promotions . . . or whether he was whistleblowing or otherwise 'going public' with matters in which the public might be expected to take

an interest." Eberhardt v. O'Malley, 17 F.3d 1023, 1026 (7th Cir. 1994).

Many of this Circuit's public concern cases have also involved speech by public employees about their government employer or employment. In these cases, we have held the speech in question to be unprotected when it related only to the employee's status in the workplace. See, e.g., Coszalter, 320 F.3d at 974 (holding that a city employee's disclosures of health and safety hazards to the state regulatory agency and the public touched on matters of public concern); Ulrich, 308 F.3d at 978 (holding that a doctor's protest against the laying off of other physicians was of public concern because it "touched on the ability of the hospital to care adequately for patients, sparking debate about whether there were less harmful ways to address the hospital's budgetary problems"); Havekost v. United States Dep't of the Navy, 925 F.2d 316, 319 (9th Cir. 1991) (holding that an "internal dispute over the Navy's dress code, scheduling, and responsibility for certain lost commissary profits" were "the minutiae of workplace grievances" and thus not of public concern).

Indeed, all our Circuit's cases on which the dissent relies in interpreting the public concern test, post at 1193-94, involve speech related to the employee's job. In addition to Ulrich and Havekost mentioned above, see Weeks v. Bayer, 246 F.3d 1231, 1234 (9th Cir. 2001) (statement by employee of state department of prisons that the department's substance abuse program was at risk of being discontinued due to his supervisor's failure to secure funds); Roe v. City & County of San Francisco, 109 F.3d 578, 580-81 (9th Cir. 1997) (discussed below); McKinley v. City of Eloy, 705 F.2d

1110, 1112 (9th Cir. 1983) (criticism by police officer of the city council's decision not to give police officers an annual raise). These cases acknowledge that speech is not of public concern when it relates only to personnel disputes or grievances. A good example is Roe v. City & County of San Francisco, 109 F.3d 578, from which the dissent quotes extensively. See post at 1193-94, 1196-97, 1199-1200. That particular Roe, a police officer as well, wrote a memo to a prosecutor who had refused to prosecute one of Roe's drug cases, attaching some legal authorities that he thought would be helpful. Roe, 109 F.3d at 581. When Roe was subsequently transferred to another department, he claimed the transfer was retaliatory in violation of his right to free speech. Id. at 582. In assessing whether Roe's memo addressed a matter of public concern, we said, "The focus must be upon whether the public or community is likely to be truly interested in the particular expression, or whether it is more properly viewed as essentially a private grievance." Id. at 585 (emphasis added). As we held, "an internal dispute with no wider societal implications is not a matter of public concern. Instead, it falls within the genre of 'personnel disputes and grievances' which are not constitutionally significant." Id. at 586 (quoting McKinley, 705 F.2d at 1114) (emphasis added). On the other hand, we recognized that "to deserve First Amendment protection, it is sufficient that the speech concern matters in which even a relatively small segment of the general public might be interested." Id. at 585.

The Supreme Court extended the public concern test in Rankin v. McPherson, 483 U.S. 378, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987), to public employee speech that did not relate to the employee's job or the government

employer but that did occur at work. In that case, a clerical employee in a county constable's office was fired for commenting to a coworker, upon hearing of the assassination attempt on President Reagan, that "if they go for him again, I hope they get him." Id. at 381. The Court held that the statement dealt with a matter of public concern because it was "made in the course of a conversation addressing the policies of the President's administration" and "came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President." Id. at 386. As a result, the Court for the first time "applied the Pickering balance to speech whose content had nothing to do with the workplace." NTEU, 513 U.S. at 466 n.10.

In this Circuit, we subsequently examined public employee speech that is not about the job but occurs at work in Tucker v. California Department of Education, 97 F.3d 1204 (9th Cir. 1996). That case dealt with religious advocacy in the workplace. In holding such advocacy to be "obviously of public concern," we recognized that "this circuit and other courts have defined public concern speech broadly to include almost any matter other than speech that relates to internal power struggles within the workplace." Id. at 1210 (emphasis in original). Neither Rankin nor Tucker directly governs the facts of Roe's case, however, because Roe's non-job-related speech occurred away from the workplace.

Thus we turn to the Supreme Court's decision in NTEU, which applied the public concern and Pickering balancing tests to public employee speech that took place "outside the workplace, and involved content

largely unrelated to [the employees'] government employment." NTEU, 513 U.S. at 466. NTEU involved a First Amendment challenge to a statute that prohibited federal executive branch employees from receiving honoraria for individual appearances, speeches or articles. 513 U.S. at 459-60. The suit was brought by a class comprising all executive branch employees below grade GS-16 who, but for the challenged statute, would receive honoraria. Although the class action did not address the government's suppression of any single instance of speech, the named plaintiffs submitted affidavits describing the types of expressive conduct for which they had received honoraria prior to the ban. These included articles about the environment and Russian history, lectures on the Quaker religion and black history, and radio and television reviews of dance performances. 513 U.S. at 461-62. Whether these expressive activities touched on matters of public concern was not the central issue in the case, but the District of Columbia Circuit had "paused briefly" to consider the issue and readily concluded that the plaintiffs' lectures and articles constituted speech on matters of public concern: We read the "public concern" criterion as referring not to the number of interested listeners or readers but to whether the expression relates to some issue of interest beyond the employee's bureaucratic niche. None of the examples of past or intended expression mentioned by plaintiffs involves such a parochial concern. Nat'l Treasury Employees Union v. United States, 301 U.S. App. D.C. 1, 990 F.2d 1271, 1273 (D.C. Cir. 1993). n5 The Supreme Court did not disagree with the D.C. Circuit's reasoning. Indeed, the Court emphasized that the plaintiffs "seek compensation for their expressive activities in their capacity as citizens, not as

Government employees." NTEU, 513 U.S. at 465. It noted that "with few exceptions, the content of [plaintiffs'] messages has nothing to do with their jobs." Id. "[The plaintiffs] do not address audiences composed of co-workers or supervisors; instead, they write or speak for segments of the general public. Neither . . . the subject matter of their expression . . . nor the kind of audiences they address has any relevance to their employment." Id.

The Court emphasized that it had "applied Pickering's balancing test only when the employee spoke 'as a citizen upon matters of public concern' rather than 'as an employee upon matters only of personal interest.'" 513 U.S. at 466 (quoting Connick, 461 U.S. at 147) (emphasis added by NTEU). "Thus," the Court continued, "private speech that involves nothing more than a complaint about a change in the employee's own duties may give rise to discipline without imposing any special burden of justification on the government employer. If, however, the speech does involve a matter of public concern, the government bears the burden of justifying its adverse employment action." Id. (citation omitted). The Court concluded that the plaintiffs' "expressive activities . . . fall within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace," because "the speeches and articles for which [the plaintiffs] received compensation in the past were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment." Id. As in Rankin, the Court then applied Pickering balancing, concluding that the employees' interest in expressing themselves outweighed the

government's interest in operational efficiency. 513 U.S. at 466-77. n6

Although in this Circuit we have not yet addressed the degree of protection to be afforded off-the-job, non-work-related speech by public employees, we did cite Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985), with approval in Roe v. City & County of San Francisco, 109 F.3d 578, 585 (9th Cir. 1997). In Berger, the Fourth Circuit held that a police officer's off-duty, non-job-related musical performances in "blackface" makeup were matters of public concern even though the employee claimed and the court presumed that the performances were "neutral as to any political or even social views." Berger, 779 F.2d at 999. n7 As the court aptly observed in explaining its holding:Pickering, its antecedents, and its progeny -- particularly Connick -- make it plain that the "public concern" or "community interest" inquiry is better designed -- and more concerned -- to identify a narrow spectrum of employee speech that is not entitled even to qualified protection than it is to set outer limits on all that is. The principle that emerges is that all public employee speech that by content is within the general protection of the first amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely "personal concern" to the employee -- most typically, a private personnel grievance.Id. at 998 (second emphasis added). n8

C.

These precedents confirm what the Supreme Court first explained in Connick: the purpose of the public

concern test is to preempt a narrow category of claims involving speech related to a public employee's status in the workplace. Accordingly, we hold that when the employee's speech is not about his government employer or employment, is directed to a segment of the general public and occurs outside the workplace, that speech satisfies the public concern test because such speech is not related to the employee's status in the workplace. n9

In determining whether Roe's expressive conduct meets the public concern threshold, we consider the "content, form, and context" of his speech. Connick, 461 U.S. at 147-48. With respect to content, as we have already noted, the defendants do not argue that Roe's sexually explicit videos are in any way about the San Diego Police Department or the City of San Diego. See supra note 4. Indeed, the defendants concede that Roe's expressive conduct is "unrelated to work." Responding Br. of Appellees at 28. "[When] the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication . . . we conclude that it is necessary to regard the [employee] as the member of the general public he seeks to be." Pickering, 391 U.S. at 574; see also NTEU, 513 U.S. at 466 (concluding that public employee speech was matter of public concern because, inter alia, it "involved content largely unrelated to their government employment.").

The dissent and defendants argue, however, that the content of the speech must in some way enlighten the public on issues of political or social importance in order to be protected under the public concern test. See post at 1199-1200. Justice Scalia's dissent in Rankin took this

narrow view of "public concern." See 483 U.S. at 395 (Scalia, J., dissenting) ("Speech on matters of public concern is that speech which lies at the heart of the First Amendment's protection.") (internal quotation marks and citation omitted). Neither the Rankin nor the NTEU majorities adopted this view; accordingly, neither do we. Otherwise, we would remove a broad array of public employee speech from First Amendment protection, giving the public concern test a role for which it was never intended. The purpose of the test is to prevent the constitutionalization of "employee complaints over internal office affairs." Connick, 461 U.S. at 149. That purpose is not implicated here where Roe's speech is not about his employment or employer.

The dissent also contends that "the pornographic nature of Roe's videos is highly relevant" and that Roe's videos constitute the "lowest level" of speech. Post at 1198, 1199. But even the expression of "ideas that the overwhelming majority of people might find distasteful or discomforting" is protected by the First Amendment. Virginia v. Black, 538 U.S. 343, 155 L. Ed. 2d 535, 123 S. Ct. 1536, 1547 (2003) (cross burning). It is "well established that speech may not be prohibited because it concerns subjects offending our sensibilities." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245-46, 152 L. Ed. 2d 403, 122 S. Ct. 1389 (2002) (protecting virtual child pornography that is produced without using real children). Roe's videos are indeed crude and sexually explicit, but they are not obscene under Supreme Court precedents and thus would be entitled to some protection under the First Amendment. See id.

The level of the First Amendment interest at stake is an important factor in the Pickering balancing phase, but the relevant content inquiry for purposes of the public concern test is whether the subject matter of the public employee's speech falls within the "genre of personnel disputes and grievances," a category of speech that is not constitutionally significant. Roe v. City & County of San Francisco, 109 F.3d at 586 (internal quotation marks omitted); see Johnson v. Multnomah County, Or., 48 F.3d 420, 424, 426 (9th Cir. 1995) (recognizing that the "First Amendment interest in protecting recklessly false statements" is "very limited" but holding that "the recklessness of the employee and the falseness of the statements should be considered . . . as part of the Pickering balancing test," not the public concern test).

Roe's videos do not fall within that unprotected category of personnel disputes and grievances. The dissent maintains, however, that Roe's failure to remove his seller's profile on eBay does pertain to a personnel dispute because "it expressed disdain or disregard for the employment restrictions placed upon him by his supervisor." Post at 1196. On a motion to dismiss for failure to state a claim, we must draw all reasonable inferences in favor of the non-moving party. See Everest & Jennings, Inc. v. Am. Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994). Aside from the fact that the defendants do not advocate the dissent's inference, nothing in Roe's complaint suggests that his failure to take down his seller's profile was intended as an expression of protest against the Department's restrictions. Moreover, we doubt that any viewer who saw Roe's seller profile on eBay understood it to reflect a grievance about the San Diego Police Department's

restrictions, especially when the profile does not associate the seller with the Department. Cf. Spence v. Washington, 418 U.S. 405, 410-11, 41 L. Ed. 2d 842, 94 S. Ct. 2727 (1974) (concluding that conduct expressed a particular message where "an intent to convey [that] particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."). n10

With respect to the form and context of the speech, Roe's videos were made and distributed "outside the workplace." NTEU, 513 U.S. at 466. In addition, Roe did not choose to address "audiences composed of co-workers or supervisors." 513 U.S. at 465. Rather, Roe's expression was directed to "segments of the general public." Id. He sold the videos on a public and widely used auction site, and the Internet itself is a medium that reaches a diverse and widespread audience. Thus, Roe's choice of medium and audience indicates that he was speaking as a member of the general public rather than as an employee.

In addition to the content, form and context, we have also looked to the employee's "motivation" for speaking. Ulrich, 308 F.3d at 979; Pool v. VanRheen, 297 F.3d 899, 908 (9th Cir. 2002). We have cautioned that "motive should not be used as a litmus test for public concern; rather, content is the greatest single factor." Havekost, 925 F.2d at 318 (internal quotation marks omitted). The dissent maintains that Roe's speech was furthering a "purely private interest" because his speech was "intended to facilitate his outside business activities." Post at 1197. That may be true, but profit or commercial gain is not the type of motivation that the

public concern test screens from protection. As the Supreme Court has recognized, "compensation provides a significant incentive toward more expression." NTEU, 513 U.S. at 469. In NTEU, the employees gave lectures and wrote articles in exchange for substantial honoraria -- as much as $ 3,000 per year for some employees -- in order to supplement their income. 513 U.S. at 461-63. Notwithstanding that the employees were motivated by monetary gain, the Supreme Court concluded that such speech fell "within the protected category of citizen comment on matters of public concern." 513 U.S. at 466.

In sum, Roe's expressive conduct was not about private personnel matters, was directed to a segment of the general public, occurred outside the workplace and was not motivated by an employment-related grievance. Thus, he was not speaking as an employee on matters related to his personal status in the workplace. Under the public concern test, Roe's expressive conduct does not fall within an unprotected category of speech, so the district court erred in dismissing his First Amendment claim without proceeding to Pickering balancing.

D.

Our holding does not render the Department powerless to act against Roe for his off-duty, non-work-related conduct. Rather, whether Roe's speech is ultimately entitled to protection will depend on the Pickering balancing phase. n11 In that step, the free speech interests in Roe's expressive activity must be weighed against the Department's interest "in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568; see also Rankin,

483 U.S. at 388; Waters, 511 U.S. at 673; Cochran v. City of Los Angeles, 222 F.3d 1195, 1200-02 (9th Cir. 2000); Gilbrook v. City of Westminster, 177 F.3d 839, 867-69 (9th Cir. 1999) (identifying various factors that weigh in the balance); cf. Melzer, 336 F.3d at 197-99 (applying the balancing test in a similar context). Alternatively, under Mt. Healthy, the Department can prevail on Roe's First Amendment claim if it proves by a preponderance of the evidence that it would have terminated Roe regardless of his expression. See Umbehr, 518 U.S. at 685. Because the district court did not reach the Pickering balancing phase or the Mt. Healthy mixed motive analysis, we remand to the district court for further proceedings.

REVERSED and REMANDED.

Footnotes

n1 Roe is proceeding under a pseudonym pursuant to a district court order granting him permission to do so.

n2 Because this case comes before the court on appeal from a dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), all facts alleged in Roe's complaint must be taken as true and must be construed in the light most favorable to him. Transmission Agency v. Sierra Pac. Power Co., 295 F.3d 918, 923 (9th Cir. 2002).

n3 Roe also alleged that his termination violated his constitutional right to due process and his rights under state law. The district court dismissed the due process claim with prejudice after Roe conceded that his claim was without merit. The court dismissed the state law claims "without prejudice if Plaintiff chooses to refile in

state court." On appeal, Roe does not challenge the dismissal of his due process and state law claims.

n4 The dissent contends that Roe's speech is "plainly related to his job." Post at 1195. However, the defendants have not argued that Roe's speech is in any way related to his employment with the San Diego Police Department or the City, nor do they argue that offering to sell a uniform formerly used by the SDPD somehow linked Roe's videos to the Department. On the contrary, they have conceded that this case involves speech unrelated to the job: "Roe correctly states that [the] Ninth Circuit has never addressed the exact issue which we have here -- off duty conduct, unrelated to work." Responding Br. of Appellees at 28 (emphasis added).

n5 The dissent contends that the public concern test was not an issue in the case at all. See post at 1200. However, the Court had to decide whether the speech at issue addressed a matter of public concern before it could reach the Pickering balancing phase. See Connick, 461 U.S. at 146 ("If [the employee's speech] cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for [the court] to scrutinize the reasons for [the employee's] discharge.").

n6 The dissent suggests we should turn to Waters v. Churchill, 511 U.S. 661, 128 L. Ed. 2d 686, 114 S. Ct. 1878 (1994) (plurality opinion), instead of NTEU for guidance. Post at 1202. We agree with the lesson the dissent urges us to take away from Connick and Waters, that "the government's power as employer is broader than its power as sovereign." Post at 1203. The question remains, however, just how broad that power

is in the specific context of off-duty, non-job-related speech. Waters does not address that question, but Justice O'Connor, the author of the plurality opinion in Waters, did so in NTEU. She readily concluded that the speech at issue there met the public concern threshold because "respondents challenge the ban as it applies to off-hour speech bearing no nexus to Government employment -- speech that by definition does not relate to 'internal office affairs' or the employee's status as an employee. Cf. [Connick v. Myers]." NTEU, 513 U.S. at 480 (O'Connor, J., concurring in part and dissenting in part). Moreover, the same Court that decided Waters resolved NTEU only a year later. Thus, we believe that Waters does not counsel an approach different from that in NTEU.

n7 The dissent claims that Berger is "inapposite" because that case involved "artistic expression" whereas Roe's speech does not. Post at 1196. But Berger viewed artistic expression broadly: "one of the fundamental rights secured by the amendment is that of free, uncensored artistic expression -- even on matters trivial, vulgar, or profane." Berger, 779 F.2d at 1000.

n8 Other circuits that have addressed off-duty, non-work-related speech have concluded that balancing is the appropriate method to resolve the public employee's First Amendment claims. See Melzer v. Bd. of Educ. of N.Y., 336 F.3d 185, 194-200 (2d Cir. 2003) (assuming that a high school teacher's membership in the North American Man/Boy Love Association touched on a matter of public concern and holding under Pickering balancing that the school was justified in terminating the teacher's employment); Pappas v.

Giuliani, 290 F.3d 143, 146-48 (2d Cir. 2002) (assuming that a police officer's off-duty, anonymous mailings of racist materials were of public concern and holding under Pickering balancing that the police department was justified in firing the officer); Eberhardt v. O'Malley, 17 F.3d 1023, 1026-28 (7th Cir. 1994) (holding that even if an assistant state's attorney's novel about the criminal justice system did not touch on a matter of public concern, his employer had to show legitimate interests that outweighed the social interest in the attorney's speech); Flanagan v. Munger, 890 F.2d 1557, 1562-67 (10th Cir. 1989) (holding that the public concern test did not apply to the sale of sexually explicit, non-obscene videos by police officers because the expressive conduct did not occur at work and was not about work, and that Pickering balancing tipped in the officers' favor).

n9 Contrary to the dissent's characterization, we have not established a "new definition of the public concern test." See post at 1199. Rather, we have merely applied the public concern test to off-the-job, non-work-related speech. In doing so, we interpret "public concern" in the same way as the Supreme Court and this Circuit have in other contexts: speech that "does not relate to internal office affairs or the employee's status as an employee." NTEU, 513 U.S. at 480 (O'Connor, J., concurring in relevant part and dissenting in part) (internal quotation marks omitted).

The dissent also claims that Roe himself does not assert that his videos convey speech on a matter of public concern. See post at 1196. Although Roe urges this court to adopt the Tenth Circuit's approach in Flanagan, see supra note 8, he also argues that his

speech meets the public concern test. See Br. of Appellant at 26.

n10 Moreover, as the dissent recognizes, Roe was terminated in part for the content of his videos, not just disobedience for failing to take down his seller's profile. See post at 1190-91. Indeed, Roe has alleged that the content of his videos was the principal reason for his termination. At this procedural stage, we must accept this fact as true. See Zimmerman v. City of Oakland, 255 F.3d 734, 737 (9th Cir. 2001). The Department will have ample opportunity to prove on remand under the mixed motive analysis of Mt. Healthy that it would have fired Roe for disobedience or outside employment regardless of his expression. See Umbehr, 518 U.S. at 685.

n11 Federal courts will not necessarily have to "sit in judgment over every adverse employment action," as the dissent asserts. Post at 1200. Suits may still be dismissed for failure to state a claim or on summary judgment under the Pickering balancing test, which is a question of law for the court. See Bauer v. Sampson, 261 F.3d 775, 784 (9th Cir. 2001).

DISSENT BY: Kim M. Wardlaw

DISSENT: WARDLAW, Circuit Judge, dissenting:

I respectfully dissent.

Today the majority announces that any speech by a public employee is protected as a matter of public concern from an adverse employment decision so long as it "does not fall within an unprotected category of speech," "was not about private personnel matters, was

directed to a segment of the general public, occurred outside the workplace and was not motivated by an employment-related grievance." Ante, at 1186, 1187. The majority's new connect-the-dots public concern test flatly ignores the nature and content of the expressive conduct at issue in this case, and so dilutes the "public concern" threshold for application of the Pickering balancing test as to read it out of existence. Although the majority purports to divine its sweeping new rule from United States v. National Treasury Employees Union ("NTEU"), 513 U.S. 454, 130 L. Ed. 2d 964, 115 S. Ct. 1003 (1995), that case involved neither an adverse employment decision by the government as employer nor the public concern test. Because the majority's astonishing new rule disregards the content of public employee speech and blurs the distinction between the government's exercise of power as employer rather than sovereign, it directly contravenes the public employee speech doctrine developed in Pickering v. Board of Education, 391 U.S. 563, 571-72, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), Connick v. Myers, 461 U.S. 138, 146, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), and Waters v. Churchill, 511 U.S. 661, 675, 128 L. Ed. 2d 686, 114 S. Ct. 1878 (1994), as well as a host of Ninth Circuit cases defining the type of speech that rises to the level of "public concern."

Applying its new version of the public concern test to the facts of this case, the majority holds that the San Diego Police Department ("SDPD") is required to justify in federal court its decision to fire Roe for violating departmental regulations by offering for sale over the internet an SDPD uniform and offering and selling videotapes of himself stripping off a police

uniform and masturbating. I simply cannot agree to a new rule of law that produces such an absurd result.

I

Because the district court dismissed this action at the pleading stage, we must accept as true the facts alleged in Roe's complaint and construe them in the light most favorable to him. See Transmission Agency v. Sierra Pac. Power Co., 295 F.3d 918, 932 (9th Cir. 2002). This does not mean, as the majority apparently believes, that we may overlook allegations in Roe's complaint (ER 1-18) that are harmful to his case. Accurately set forth, the facts make clear that Roe's expressive conduct was both related to his job and not on a matter of public concern.

Roe was formerly employed as an officer of the SDPD. ER 2. During his tenure, he produced, offered for sale, and sold through the adults-only section of the eBay internet auction site videotapes depicting himself stripping off a police uniform and masturbating. ER 4-6. He also offered for sale police uniforms formerly used by the SDPD and the National City Police Department. ER 3. Roe utilized the eBay user-name "Code3stud@aol.com" and described himself in his seller's profile as being "in the field of Law Enforcement." ER 3, 6. He included his picture in the listings of the items he offered for sale. ER 5.

Another SDPD officer discovered Roe's internet marketing activities through an eBay search. ER 3. In linking to Roe's adults-only listings, the officer had to "certify" that he did not find "pornographic images of nude adults, adults engaged in sexual acts or other

sexual material to be offensive or objectionable." ER 4. As part of the SDPD's further investigation of Roe's activities, a different SDPD officer purchased from Roe a pair of men's briefs and one of his videos. ER 8. That officer also emailed to Roe a request for a custom made video for a friend wherein Roe would pretend to be issuing the friend a citation and would "strip down while writing the ticket and make [the friend] a deal to take it back, which would end up with [Roe's masturbation]." ER 9. Roe made the customized tape, and sold and shipped it to the undercover officer. Id. Roe was later interviewed as part of the investigation and admitted to all of the foregoing conduct. ER 9-10.

Following the investigation, the SDPD Professional Standards Unit determined that Roe had violated three department policies -- Unbecoming Conduct, Immoral Conduct, and Outside Employment. ER 10. Roe's captain ordered him to cease such activities. Id. Nevertheless, Roe maintained his eBay seller's profile, which included a description and the prices of his first two videos, as well as the price for a custom-made video. ER 10-11. After discovering this, the SDPD, citing a fourth policy -- Obedience to Lawful Orders -- began termination proceedings against Roe, which culminated in the June 29, 2001 Notice of Termination for violation of all four policies. ER 11-13.

Roe sued in federal court, contending that his termination violated his First Amendment rights. Judge Keep correctly held that Roe failed to demonstrate how offering actual police uniforms for sale and producing, marketing, and selling sexually explicit videos for commercial profit is "speech on a matter of public concern" as defined in Connick, 461

U.S. at 138, and Rendish v. City of Tacoma, 123 F.3d 1216 (9th Cir. 1997), and granted summary judgment for the SDPD.

II

Analytically, the first question is whether Roe was terminated for exercising his right to free speech at all. After all, the SDPD terminated Roe for violations of four department policies directed to conduct, not speech. Roe was not fired for making, possessing, or viewing his videos; he was fired for selling them. On the other hand, only one of the three department policies at issue seems exclusively related to the marketing of the videos and other pornographic paraphernalia (Outside Employment). The other policies do tend to reach the subject matter of the videos themselves, i.e., Roe stripping off a police uniform and masturbating. Therefore, I do not take issue with the majority's conclusion that there is some minimally expressive activity at issue. The question then is whether that expressive activity rises to the level of public concern such that the government may be hauled into federal court to justify its decision to terminate Roe.

That is the threshold question in any public employee speech case. See Connick, 461 U.S. at 146. It is the employee who bears the burden of demonstrating that "her speech was constitutionally protected -- that it addressed a matter of public concern." Pool v. VanRheen, 297 F.3d 899, 906 (9th Cir. 2002). This threshold question is the only question the district court decided and the only question presented here.

Instead of simply answering this question, the majority digresses to ask and answer its own questions, e.g., "Whether Roe's status as a public employee effectively means he has no First Amendment protection even though his expressive conduct occurred off-duty, away from the work-place and said nothing about Roe's government employment or employer"; and "Just how broad [is the government's power as employer] in the specific context of off-duty, non-job-related speech[?]" Ante, at 1172, 1180 n.6. Questions such as these mischaracterize the actual content of Roe's speech and are utterly irrelevant to whether Roe's expressive conduct was speech on a matter of public concern. Indeed, if Roe's expressive conduct was not on a matter of public concern, he has not been deprived of any First Amendment protection at all.

Although this threshold showing must be made in every public employee speech case, the majority treats it here as an alternative rather than a required approach. But the cases the majority references in its lengthy string-cite, ante, at 1182 n.8, and elsewhere all make clear that a federal court may not resort to Pickering balancing until it first decides that the speech at issue is on a matter of public concern. See, e.g., Melzer v. Bd. of Educ., 336 F.3d 185, 196 (2d Cir. 2003) (assuming a matter of public concern); Pappas v. Giuliani, 290 F.3d 143, 146-48 (2d Cir. 2002) (same); Tucker v. Cal. Dept. of Educ., 97 F.3d 1204, 1210 (9th Cir. 1996) ("Here, the speech is religious expression and it is obviously of public concern."); Eberhardt v. O'Malley, 17 F.3d 1023, 1026-28 (7th Cir. 1994) (same, noting "the courts have had to separate speech that is not very valuable socially from whistle-blowing and other socially valuable expressive activities of public

employees, and 'matter of public concern' is the label of the distinction") (emphasis added); Berger v. Battaglia, 779 F.2d 992, 998-1002 (4th Cir. 1985) (holding speech touched on a matter of public concern).

The majority's reliance upon Flanagan v. Munger, 890 F.2d 1557, 1562-67 (10th Cir. 1989), is particularly unfortunate. Flanagan disregarded the well-established public concern test in favor of its own "protected expression" test for a public employee's "nonverbal expression that does not occur at work or is not about work." Id. at 1564. In the 14 years since Flanagan was decided, no other circuit has adopted this approach. This is not surprising, as Flanagan directly conflicts with the teachings of Pickering, Connick, and their progeny. See discussion, infra, at 1199.

Where, as here, the public employee's speech is not on a matter of public concern, our "intrusive oversight" of the government's employment decision "in the name of the First Amendment" must end. Connick, 461 U.S. at 146. As the Supreme Court reiterated fifteen years after Pickering: Pickering, its antecedents and progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no

fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. Id. (emphasis added).

III

Whether public employee speech is on a matter of public concern is a question we review de novo, "looking to the 'content, form, and context of a given statement, as revealed by the whole record.'" Ulrich v. City & County of San Francisco, 308 F.3d 968, 978 (9th Cir. 2002) (quoting Connick, 461 U.S. at 147-48 & n.7).

A

"Content is the greatest single factor in the Connick inquiry." Havekost v. United States Dep't of Navy, 925 F.2d 316, 318 (9th Cir. 1991). See also Weeks v. Bayer, 246 F.3d 1231, 1234 (9th Cir. 2001) ("First and foremost, we consider the content of the [public employee's] speech."). In this regard, we have consistently held that public employee speech is on a matter of public concern "if it helps citizens to make informed decisions about the operation of their government." Roe v. City & County of San Francisco, 109 F.3d 578, 584 (9th Cir. 1997); McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983). Thus, where public employee speech is "of no relevance to the public's evaluation of the performance of governmental agencies, that speech . . . receives no protection under the First Amendment." Ulrich, 308 F.3d at 978 (citing Pool, 297 F.3d at 907; McKinley, 705 F.2d at 1114). "In other words, [to qualify for First Amendment protection] the content of the communication must be of broader societal

concern," with the focus on "whether the public or community is likely to be truly interested in the particular expression, or whether it is more properly viewed as essentially a private grievance." Roe v. City & County of San Francisco, 109 F.3d at 585.

Other circuits have reasoned similarly. See Brochu v. City of Riviera Beach, 304 F.3d 1144, 1158-59 (11th Cir. 2002) (analyzing public concern by inquiring whether the speech at issue is "the sort of public discourse which the First Amendment was intended to protect"); Hardy v. Jefferson Community Coll., 260 F.3d 671, 678 (6th Cir. 2001) ("The [public concern] distinction is based upon the principle that 'speech on public issues occupies the highest rung of the heirarchy [sic] of First Amendment values, and is entitled to special protection.'" (quoting Connick, 461 U.S. at 145)); Azzaro v. County of Allegheny, 110 F.3d 968, 977 (3d Cir. 1997) (en banc) ("Given that the basis for the special protection accorded public concern speech is its instrumental value to the community in enabling self-governance, a court asked whether public employee's speech relates to a matter of public concern must determine whether expression of the kind at issue is of value to the process of self-governance."). See also Toni M. Massaro, Significant Silences: Freedom of Speech in the Public Sector Workplace, 61 S. Cal. L. Rev. 1, 4, 20 n.95 (1987) (recognizing that "courts defer broadly -- often decisively -- to the government employer's need for disciplinary discretion" and collecting cases where employee speech was not found to address a public concern).

The majority argues that these cases are inapposite because Roe's expressive conduct was supposedly

"unrelated to work" and thus not the type of speech the public concern test was meant to preclude. E.g., ante, at 1182-83. In making this determination of law, the majority inexplicably chooses to cite the SDPD's brief, ante, at 1170 n.4, 1183, rather than analyze the allegations of Roe's complaint, in which Roe claims that while he was employed as an officer in the SDPD: (1) he offered for sale police uniforms formerly used by the SDPD and the National City Police Department; (2) he produced and sold videotapes depicting himself stripping off a police uniform and masturbating; (3) he produced and sold a custom-made video depicting himself in uniform issuing a citation then stripping off his uniform and masturbating; (4) his eBay username referenced "Code3," a commonly understood high-priority police radio call; and (5) he described himself in his seller's profile as being "in the field of Law Enforcement." Obviously, the whole point of Roe's internet marketing activities was that his items were "genuine" because they were being offered for sale by the actual police officer pictured in the seller's profile; he used the fact that he was a police officer to market his wares. Moreover, the majority's argument that Roe's expressive conduct was not "in any way about the San Diego Police Department" and "[did] not associate [Roe] with the Department," ante, at 1183, 1185, is simply at odds with Roe's alleged facts: Roe offered for sale an actual SDPD officer's uniform. These internet marketing activities caused concern at the SDPD because, among other reasons, such activities would compromise Roe's authority and the safety of others in carrying out his duties as a police officer. Contrary to the majority's myopic interpretation of what "relates" to one's job, Roe's expressive conduct plainly related to his job.

The majority also tries to distinguish the myriad public employee speech cases on the ground that the public concern test does not preclude Roe's expressive conduct because his speech did not involve a workplace grievance. Ante, at 1175-1178, 1184-85. But the majority forgets that Roe was terminated for, among other reasons, outside employment and disobeying the orders of his captain. By continuing to maintain his eBay seller's profile after his captain ordered him to remove it, Roe's expressive conduct pertained to his job in that it expressed disdain or disregard for the employment restrictions placed upon him by his supervisor, i.e., a personnel dispute or workplace grievance. In any event, the cases referenced above from this circuit and others are relevant because they establish that public employee speech must be of "broader social concern" to receive First Amendment protection from adverse employer action.

The majority purports to buttress its argument with extensive quotation, ante, at 1181-82, from Berger v. Battaglia, a nearly twenty-year-old Fourth Circuit case. 779 F.2d at 992. But the majority conveniently brushes aside a critical aspect of that decision. Berger held that an off-duty police officer's public, "blackface" musical performances were a matter of public concern because, inter alia, those performances were "a form of artistic expression." 779 F.2d at 997. See also Tindle v. Caudell, 56 F.3d 966, 970 (8th Cir. 1995) (distinguishing Berger and holding a Halloween costume was not speech on a matter of public concern because "artistic expression before a public audience is quite different from a decision to wear a costume to a private Halloween party. Here there were no public performances, and there is little in the record to

suggest there was much entertainment value in Tindle's appearance."). Of course, neither Roe nor the majority argues that Roe's videos are a form of artistic expression. Thus, whether Berger "viewed artistic expression broadly," ante, at 1181 n.7, is irrelevant. Berger is inapposite.

Under these precedents, Roe's expressive conduct plainly does not rise to the level of "speech on a matter of public concern." Even Roe does not assert that his videos convey such speech. Indeed, he does not argue that his video masturbation communicates any idea at all. Cf. Tindle, 56 F.3d at 970 ("Tindle does not claim he intended to comment on any issue of interest to the public. . . . [Entertaining] other guests at a private party [by wearing an amusing costume] with no showing of any intended message is not speech on a matter of public concern."). Rather, Roe argues that we need not apply the public concern test, urging us instead to follow the misguided Flanagan approach. Simply put, Roe's videos do not contain material "of broader societal concern" such that they should be accorded "the highest degree of First Amendment protection." Roe v. City & County of San Francisco, 109 F.3d at 584-85 (citing McKinley, 705 F.2d at 1114).

B

Another "critical inquiry is whether the employee spoke in order to bring wrongdoing to light or merely to further some purely private interest." Havekost, 925 F.2d at 319. "If the [public employee's speech] is essentially self-interested, with no public import, then it is . . . not of sufficient concern to the general public to trigger First Amendment scrutiny. "Roe v. City &

County of San Francisco, 109 F.3d at 585. Where the government disciplines a public employee for private-interest speech, "'a federal court is not the appropriate forum' in which to review the [employment decision] 'absent the most unusual circumstances.'" Id. (quoting Connick, 461 U.S. at 147).

Here, Roe's expressive activity, although conveyed via the internet, was in actuality directed to the private individual consumer of his products rather than the general public. His "speech" was not intended to bring some government mischief to light or to inform or otherwise enlighten the public; it was intended to facilitate his outside business activities -- a "purely private interest." The majority assumes its own conclusion when it asserts that commercial gain "is not the type of motivation that the public concern test screens from [First Amendment] protection" because "compensation provides a significant incentive toward more expression." Ante, at 1186 (another out-of-context quote from NTEU, 513 U.S. at 469). If the employee's expressive conduct is not a matter of public concern, as is the case here, it is not protected by the First Amendment and there is no relevant incentive toward expression.

Thus, analysis of Roe's motivation also makes clear that his videos are not entitled to the First Amendment protections reserved to public employees for speech on a matter of public concern.

C

Roe simply has not met his burden of showing that the "content, form, and context" of his expressive conduct

meets the public concern threshold. Although the majority employs many euphemisms to describe the content of Roe's videos, e.g., "sexually explicit but not obscene," "crude and sexually explicit," but "within the broad realm of protected expression," ante, at 1166, 1172, 1170; 1184, Roe himself alleges that his videos are pornography -- a more accurate, and honest, assessment. But displaying, offering to sell, and selling pornography may not be honestly considered "as relating to any matter of political, social, or other concern to the community." Connick, 461 U.S. at 146. Roe's "speech" is of no more "concern to the community" than any other private commercial transaction involving pornography.

The pornographic nature of Roe's videos is highly relevant because it establishes under our precedent that Roe's speech is not on a matter of public concern. Although the majority appears to suggest that this dissent is founded upon a view that Roe's videos are "distasteful or discomforting" or because Roe's videos "offend our sensibilities," ante, at 1184, such speculation does not advance the majority's argument. Whether Roe's "distasteful or discomforting" videos would otherwise be protected by the First Amendment misses the point entirely. Because Roe's videos "cannot be fairly characterized as constituting speech on a matter of public concern," Connick, 461 U.S. at 146, Roe's First Amendment rights have not been violated and the SDPD should not be required to justify in federal court its decision to terminate him.

IV

The majority contends that a new definition of the public concern test is warranted here because Roe's expressive conduct (purportedly) did not relate to his job and was not about personnel matters; occurred outside of work; and was "directed to a segment of the general public." Ante, at 1186. Applying its new test, the majority boldly concludes, without citing a single case, that speech is a matter of public concern and Pickering balancing is required so long as the speech meets these criteria and "does not fall within an unprotected category of speech" under the First Amendment. Ante, at 1187. Although it claims otherwise, the majority thus adopts the backward "protected expression" test that the Tenth Circuit invented in Flanagan as an "alternative" to the public concern test where a public employee's "nonverbal protected expression does not occur at work and is not about work." 890 F.2d at 1564. No other court has employed Flanagan's "protected expression" approach, and no court has been so bold as to try to recast it as a modified public concern test -- until now. See ante, at 1183 n.9.

The majority's misguided, misnamed approach misapprehends why there is a public concern test in the first place. The test exists to exempt from employer discipline public employee discourse at the "highest" level of protected speech -- not the lowest level. Roe v. City & County of San Francisco, 109 F.3d at 584-85 (citing McKinley, 705 F.2d at 1114). It exists because if there were not a threshold of protected speech, the public employer would be free to fire an employee for any speech of which the employer disapproved,

including speech on matters of great public import. To assert, again without any authority, that a public employee may engage in the full range of protected speech free from consequence ignores Supreme Court and our own jurisprudence, which have carved out from the prospect of public employer discipline only a segment of protected speech. The majority turns the doctrine of public employee speech on its head -- Katie, bar the door! -- for the federal courts now will sit in judgment over every adverse public employee action involving not speech on a matter of public concern, but speech in the slightest.

Nor does NTEU, 513 U.S. at 454, further the majority's cause. In NTEU, the Supreme Court struck down the Ethics in Government Act's ban on receipt of honoraria by federal government employees for various speech activities. In its discussion of NTEU, the majority acknowledges that the public concern issue "was not the central issue in the case." Ante, at 1179. In point of fact, it was not at issue in the case at all. Public employees had submitted affidavits describing their compensation for past speech activities that would be prohibited under the honoraria ban, which activities included lectures on the Quaker religion and Russian and African-American history, and articles and appearances reviewing dance performances and the environment. NTEU, 513 U.S. at 461-62. Not surprisingly, the government never sought to defend the statute against the employees' First Amendment challenges on the ground that these speech activities did not involve matters of public concern. Accordingly, the Court never expressly reached the issue, implicitly finding the speech activities on matters of public

concern and proceeding to evaluate the statutory ban under a Pickering balancing test. 513 U.S. at 464-72.

The Supreme Court was not asked in NTEU to revisit its public concern holdings, and it did not "apply the public concern" test. Ante, at 1178. The majority plays fast and loose with Supreme Court precedent when it cites the D.C. Circuit's opinion in NTEU and baldly asserts that "the Supreme Court did not disagree" with that court's limited discussion of the issue. Ante, at 1179. That hardly constitutes a holding on the question of public concern. Therefore, NTEU does not provide any basis for the majority's newly minted public concern test.

Moreover, extracting convenient, abstract "compartments" of speech, e.g., "speaking as citizen, not as government employee," "addressed to a public audience," "largely unrelated to government employment," and "of interest to a segment of the general public," from NTEU to fashion a new bright-line public concern test is analytically incorrect. In the context of public employee speech, we have warned against "the 'dangers of reducing the First Amendment to a series of doctrinal cubbyholes' and of 'warping different fact situations to fit into the boxes we have created.'" Roe v. City & County of San Francisco, 109 F.3d at 586 (quoting Tucker v. Cal. Dept. of Ed., 97 F.3d 1204, 1209 (9th Cir. 1996)). See also Weeks, 246 F.3d at 1234 ("Fortunately, [in analyzing whether speech is on a matter of public concern,] we have avoided multi-part tests that would shoehorn communication into ill-fitting categories.").

It is this impermissible "fact warping" and "shoehorning" that elevates form over substance, allowing the majority absurdly to conclude that "Roe's expressive activities -- as crude as they may appear -- . . . fall[ ] within the protected category of citizen comment on matters of public concern, rather than employee comment on matters related to his personal status in the workplace." Ante, at 1170. This holding demeans the "significant contributions to the marketplace of ideas" by public employees, which are properly protected under the First Amendment. NTEU, 513 U.S. at 455-56 (noting that Nathaniel Hawthorne, Herman Melville, Walt Whitman, and federal employees of lesser literary stature did not and do not "relinquish[ ] the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest") (emphasis added). Freed from the cubby-holes and analyzed as a whole, Roe's pornographic videos do not involve a matter of public concern as heretofore defined.

V

Rather than relying on NTEU, the majority should have turned for guidance to Justice O'Connor's opinion in Waters v. Churchill, 511 U.S. at 661, which involved a public employee disciplined for her speech and discussed the fundamental rationale that animates the public concern test: "The government's role as employer . . . gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large[.]" Id. at 671. As Justice O'Connor explained: [This principle] is amply borne out by considering the practical realities of government employment, and the many situations in which, we

believe, most observers would agree that the government must be able to restrict its employees' speech. . . . Even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees.Id. at 672. See also Rendish, 123 F.3d at 1219 ("The State's interest in regulating the speech of its employees differs significantly from its interest in regulating the speech of its citizenry.").

For example, Waters recognizes that "even something as close to the core of the First Amendment as participation in political campaigns may be prohibited to government employees." Id. Similarly, although speech restrictions must "generally precisely define the speech they target," Waters recognizes that "a public employer may, consistently with the First Amendment, prohibit its employees from being 'rude to customers,' a standard almost certainly too vague when applied to the public at large." Id. at 673.

Further elaborating on this important distinction, Waters acknowledges the well-established principle that should govern our decision here:We have refrained from intervening in government employer decisions that are based on speech that is of entirely private concern. Doubtless some such speech is sometimes nondisruptive; doubtless it is sometimes of value to the speakers and the listeners. But we have declined to question government employers' decisions on such matters.Id. at 674 (citing Connick, 461 U.S. at 146-49).

The lesson of Connick and Waters is that the government's power as employer is broader than its power as sovereign. "The key to First Amendment

analysis of government employment decisions [is that] the government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. "Waters, 511 U.S. at 675. See also Connick, 461 U.S. at 147 (recognizing that a government employer may restrict speech that would otherwise not lie "beyond the protection of the First Amendment").

Roe's purely private expressive conduct is protected by the First Amendment. The government could not enact a law prohibiting him from making and selling his videos. But under Connick, Waters, and the relevant SDPD employment regulations, if Roe wishes to be an officer in the SDPD, he is subject to termination for speech within the ambit of the First Amendment, but which does not involve a matter of public concern. That employment decision lies within the sound discretion of the police department, not a federal court sitting as the "Supreme Civil Service Commission." SDPD's Brief at 16. All this means is that Roe's First Amendment rights are those of an ordinary employee, subject to the rules and regulations of his employer. The mere fact that Roe is a public employee does not gain him greater First Amendment protection than the ordinary citizen subject to the ordinary dismissal. This critical point appears to be totally lost on the majority. See ante, at 1180 n.6.

* * *

The nature and content of Roe's speech determines whether Roe's termination is subject to First Amendment review. Because Roe's speech "cannot be

fairly characterized as constituting speech on a matter of public concern, the First Amendment is inapplicable and the court need not scrutinize the reasons for any adverse actions." Ulrich, 308 F.3d at 977-78 (citing Connick, 461 U.S. at 146). Remand for analysis under Pickering or Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977), is therefore unwarranted, and I would affirm the district court.

CASE NO. 01CV1760K (CGA)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOHN ROE,
Plaintiff,

vs.

CITY OF SAN DIEGO; CITY OF SAN DIEGO POLICE DEPARTMENT; DAVID BEJARANO; GEORGE SALDAMANDO; GLEN BREITENSTEIN; and DOES 1-10,
Defendants.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS [12]

ORDER GRANTING DEFENDANT'S REQUEST FOR JUDICIAL NOTICE [14]

Filed December 21, 2001

On November 16, 2001 Defendants filed, pursuant to Fed. R. Civ. P. 12(b)(6), a motion to dismiss Plaintiff's civic rights complaint, Plaintiff opposes. All parties are proceeding through counsel.

I. Background

Plaintiff's complaint, filed September 28, 2001, alleges violations under 28 U.S.C. § 1983 of Plaintiff's civil rights guaranteed by the First Amendment, and violations of Plaintiff's due process rights under the

Fourteenth Amendment and California state law. Plaintiff alleges that he was terminated from his employment with Defendant City of San Diego (City) and Defendant San Diego Police Department (Department) because of the content, production and sale of sexually explicit videotapes in violation of his rights.

The facts of the case are not in dispute. The following description is based on the pleadings and should not be taken as findings of fact by the Court. On or about July 13, 2000, a San Diego Police Department sergeant, Robert Dare, while on an Internet auction web site known as eBay, came across a seller identified as "Code3stud@ aol.com," selling a uniform formerly used by the National City Police Department, a uniform formerly used by the San Diego Police Department, and a number of items listed in the "adults only" section of the eBay site. The items so listed included videos depicting Plaintiff alone, engaging in masturbation. The complaint alleges that Plaintiff was identified because Dare was Plaintiff's supervisor at the time.

Thereafter, the San Diego Police Department's Professional Standards Unit (PSU) initiated an investigation of Plaintiff regarding his lawful, off-duty conduct of selling, among other things, personal homemade videotapes and articles of clothing on eBay. None of the items for sale identified Plaintiff as an employee of or as being affiliated with the City or the Department. The complaint alleges that all aspects of the production, manufacturing, sale and shipment of the videotapes were conducted while Plaintiff was off-duty and away from his employer's premises and without using any time or equipment belonging to the City or

the Department, and at no expense to the City or the Department. Plaintiff went to some length to conceal his identity. He never identified himself by name in any sale or listing, and he never identified himself as a San Diego police officer. He described himself in his eBay seller's profile as living in "Northern California" and being "in the field of law enforcement". He directed all payments to "S. Shatswell", utilizing a post office box address in northern California.

A Department investigator purchased a pair of white men's briefs and a sexually explicit video from Plaintiff by anonymous eBay auction. The investigator thereafter ordered a custom videotape, requesting that Plaintiff pretend that he was giving another man a ticket, and then engage in sexually explicit acts. Plaintiff produced the requested videotape and sold it to the investigator through his eBay profile.

On October 17, 2000, Plaintiff was interviewed by a police department investigator regarding Plaintiff's involvement in the sale of videotapes and clothing on eBay. Plaintiff cooperated with the interview. A PSU report was subsequently prepared which concluded that Plaintiff violated three Police Department policies (unbecoming conduct, immoral conduct, and outside employment).

On December 20, 2000, Defendant Breitenstein ordered Plaintiff to "cease displaying, manufacturing, distributing or selling any sexually explicit materials or engaging in any similar behavior, via the Internet, U.S. Mail, commercial vendors or distributors, or any other medium available to the public." Plaintiff complied with

the order by removing all items he had listed for sale on eBay, but did not remove his seller's profile.

Plaintiff alleges that on February 1, 2001, Dare searched the eBay site and was unable to locate any active auction items offered for sale by Plaintiff, but did view Plaintiff seller's profile. Plaintiff alleges that he did not regularly update his seller's profile and had not modified it since creating it on or about April 2000. Plaintiff further alleges that based upon the presence of his seller's profile, which displayed neither sexually explicit material nor photographs but did describe the first two videos Plaintiff produced, Dare prepared a misconduct report on or about February 13, 2001, alleging a February 1, 2001, violation of Breitenstein's December 20, 2000, order. That report recommended "[a]ppropriate disciplinary action". On March 29, 2001, the Department served Plaintiff with an Advance Notice of Adverse Action - Termination, signed by Defendant Breitenstein, proposing termination of Plaintiffs employment with the City. The proposal was based on the allegations of violations of the three policies discussed above, as well as an alleged violation of the Department policy regarding obedience to lawful orders.

On April 27, 2001, Plaintiff participated in a conference in order for him to respond to his proposed termination, On May 4, 2001, Plaintiff was served with a Notice of Departmental Appeal Rights, signed by Defendant Breitenstein. That Notice advised that Breitenstein was forwarding his recommendation to the Chief of Police that plaintiff's employment with the City be terminated. On June 8, 2001, Plaintiff, through counsel, submitted a written response to Defendant Chief of

Police David Bejarano and Defendant Assistant Chief of Police George Saldamando regarding the proposal to terminate his employment. On or about June 21, 2001, Plaintiff received a letter, dated June 18, 2001, from Defendant Saldamando advising that Defendant Saldamando was upholding the recommendation to terminate Plaintiff's employment with the City.

Plaintiff was terminated on June 29, 2001 by a Notice of Termination signed by Defendant Bejarano upholding the proposal to terminate based on the charges alleged in the March 29, 2001 Advance Notice of Adverse Action - Termination. On June 29, 2001, Dare also served Plaintiff with a performance evaluation covering the period of January 7, 2001, through April 27, 2001. The evaluation concluded that Plaintiff met department standards for his position and noted that he had received a letter of commendation during the rating period. The evaluation noted no deficiencies in Plaintiff's performance for the rating period.

Additionally, the complaint stated that there were no allegations in the documents recommending and implementing Plaintiff's termination (i) that Plaintiff's off-duty conduct of producing the videotapes or selling the video tapes and items o clothing through eBay was unlawful; (ii) that Plaintiff was not the lawful owner of the materials sold or offered for sale through eBay; (iii) that any of the videotapes produced by Plaintiff were obscene in nature; (iv) that Plaintiff s off-duty conduct of producing the videotapes or of selling the videotapes and items of clothing through eBay in any way affected Plaintiff's productivity, performance or ability to do his job as a police officer; (v) that any member of the public complained to defendants about Plaintiff's off-duty

conduct of producing the videotapes or of selling the videotapes and items of clothing through eBay; (vi) that any member of the public recognized Plaintiff as an employee of Defendants from Plaintiff s seller's profile, auction item descriptions, auction item pictures or any of the items sold through eBay; (vii) that any of Plaintiff's off- duty conduct interfered with the regular operation of Defendants; (viii) that Defendant actually displayed any sexually explicit materials after Defendant Breitenstein's December 20, 2000, order; (ix) that plaintiff actually manufactures any sexually explicit materials after Defendant Breitenstein's December 20, 2000, order; (x) that Defendant actually distributed any sexually explicit materials after Defendant Breitenstein's December 20, 2000, order; or (xi) that Plaintiff actually sold any sexually explicit materials after Defendant Breitenstein's December 20, 2000, order. Further, the complaint alleges that Plaintiff was not charged criminally or administratively with producing or selling obscene materials.

II. Defendants' Motion to Dismiss

A. Standard of Review

1. Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for failure to state a claim upon which relief can be granted. Such a dismissal can be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988). Under Rule 12(b)(6), a complaint should not be dismissed for failure

to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of his or her claim for relief. See Levine v Diamanthuset, Inc., 950 F.2d 1478, 1482 (9th Cir. 1991). In applying this standard, the court must treat all of plaintiff's factual allegations as true. Experimental Eng'g, Inc. v. United Technologies Corp., 614 F.2d 1244, 1245 (9th Cir. 1980). On a Rule 12(b)(6) motion, the court assumes that all general allegations "embrace whatever specific facts might be necessary to support them." Peloza v. Capistrano Unified Sch, Dist., 37 F.3d 517, 521 (9th Cir. 1994), cert. denied, 515 U.S. 1173 (1995). However, the court does not have to accept as true conclusory allegations that contradict facts which may be judicially noticed or which are contradicted by documents referred to in the complaint. See, e.g., Steckman v. Hart Brewing Inc., 143 F.3d 1293, 1295-1296 (9th Cir. 1998). The court, likewise, is not bound to assume the truth of legal conclusions simply because they are stated in the form of factual allegations. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981), cert. denied, 454 U.S. 1031 (1981). To dismiss with prejudice, it must appear to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proven. Reddy v. Litton Indus., 912 F.2d 291, 293 (9th Cir. 1990), denied, 542 U.S. 921 (1991).

B. Analysis

1. Complaint not Dismissed Pending Pseudonym Motion

Plaintiff filed his initial complaint under the pseudonym John Roe, without first seeking permission from the court to do so. Plaintiff has filed a separate motion,

which the Court is considering concurrently with the instant motion, requesting permission to proceed under a pseudonym. Defendants assert that Plaintiff's complaint must be dismissed because Plaintiff cannot proceed under a pseudonym in this matter until after a court has given him permission to do so. In so asserting, Defendants rely on Fed. Civ. P. 10(a), which requires that the name of the party be set forth in the caption.

The Court declines to dismiss Plaintiff's complaint on this ground as it finds Defendants' reasoning to be without merit and disingenuous, The Ninth Circuit has ruled that in an action by named plaintiffs under the Fair Labor Standards Act, such plaintiffs may conceal their identities upon certain showings. Does I Through XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1063 (9th Cir. 2000). Although the Court has taken up the pseudonym issue in its consideration of Plaintiff's separate motion, the Court finds that the availability of use of pseudonyms by plaintiffs in certain circumstances must permit the use of such pseudonyms in a Plaintiff's initial complaint. If a plaintiff were forced to file his or her initial complaint under his or her real name, the entire purpose of proceeding under a pseudonym would be defeated. The initial complaint is a matter of public record, and once a plaintiff has opened a file number in federal court using his or her real name, any attempt to proceed under a pseudonym would be pointless. A plaintiff could not even seek leave to proceed under a pseudonym in advance of filing an initial complaint without an open court file. The requirements of Rule 10(a) are satisfied by the use of a pseudonym pending disposition of a request for leave to proceed under a pseudonym,

Moreover, in Advanced Textile, the Ninth Circuit implicitly ratified the notion that an application to proceed under a pseudonym is properly filed just after the complaint is filed on behalf of plaintiffs proceeding under a pseudonym. In that case, defendants moved to dismiss the complaint for failure to include plaintiffs' true names. Plaintiffs then filed a cross-motion far leave to proceed under fictitious names. The district court denied plaintiff's cross-motion and granted defendant's motion to dismiss. Instead of entering its order, the court stayed the dismissal to permit plaintiffs to amend their complaint to include their true names. Plaintiffs appealed the dismissal of their action and prevailed before the Ninth Circuit for a variety of reasons. The fact that their motion for leave to proceed under fictitious names was filed after their initial complaint was not considered by the Ninth Circuit. The Ninth Circuit reversed, permitting plaintiffs to so proceed, independent of such temporal considerations. Id. at 1064.

2. Plaintiffs First Amendment Claim Dismissed

Plaintiff's claim alleges that the acts for which his employment was terminated constitute speech protected by the First Amendment. Defendants argue that Plaintiff's First Amendment claim must be dismissed because the subject expression was not a matter of public concern, and as such, was not speech protected by the First Amendment.

Put briefly, at issue here is whether, in determining if Plaintiff's speech is protected, the Supreme Court's "public concern" test applies to the situation in this case where a public employee engages in expression which is

not at work or about work, Connick v. Myers, 461 U.S. 138 (1983), Rendish, Y, City of Tacoma, 123 F.3d 1216 (9th Cit. 1997), or whether the alternative "protected expression" test adopted by the Tenth Circuit applies in this situation, Flanagan v. Munger, 890 F.2d 1557 (10th Cir. 1989).

By way of background, the choice between applying the Connick "public concern" test, or the Flanagan "protected expression" test relates to the first prong of the test used by the Ninth Circuit in reviewing a claim by a government employee of retaliation for the exercise of constitutionally-protected rights. That test, which is referred to here as the Rendish "retaliation" test, requires that to make a finding of retaliation, the Court must consider. (1) whether the plaintiff was engaged in an activity that is entitled to constitutional protection; (2) whether the exercise of the constitutionally-protected right was a "substantial" or "motivating" factor in the defendant's action, and (3) whether the defendant has established that it would have taken the same action in the absence of the protected conduct. Rendish, 123 F.3d at 1219 (citing Gillette v. Delmore, 886 F.2d 1194, 1197 (9th Cir. 1989)). The present conflict relates only to the first prong of the Rendish "retaliation" test, that is "whether the plaintiff was engaged in an activity that is entitled to constitutional protection."

The two-pronged Connick "public concern" test provides that (1) to be protected by the First Amendment, a public employee's speech must involve a matter of public concern, and (2) if it does, then the employee must show that his interest in commenting upon matters of public concern outweighs any

adversely affected interest of the city in promoting efficient delivery of public services, Rendish, 123 F.3d at 1219 (citing Connick, 461 U.S. 138, 140, 142, 146; Gillette v. Delmore, 886 F.2d 1194, 1197 (9th Cir. 1989). The second prong of the Connick "public concern" test is not at issue here.

The first prong of the Connick "public concern" test, which has been applied by the Ninth Circuit in Rendish, prevents a government employer from limiting speech by its employees relating to a "public concern," but otherwise allows limitations on speech. The Connick "public concern" test, and its Ninth Circuit application in Rendish, derives directly from Pickering v. Bd. of Educ., 391 U.S. 563 (1968). Pickering, Connick and Rendish, as well as all of the other Supreme Court and Ninth Circuit cases relied upon in Defendants' instant motion, each concern subject expression by a government employee which either relates to work or occurs at work. To the Court's knowledge, neither the Supreme Court nor the Ninth Circuit has considered the issue of whether the government's right to limit the otherwise protected expression of its employees extends to a case in which a public employee (1) engages in nonverbal protected expression which is (2) neither at work nor about work.

Plaintiff in this case is asking the Court to depart from the Ninth Circuit holding in Rendish contending that "Rendish is of little use to Defendants in the instant matter because the court explicitly noted that it limited its `holding to a public employee's right to pursue litigation, as protected by either the Speech Clause or the Petition Clause.'" Opposition at 3. The Court does not agree.

Rendish involved a retaliation claim alleging violation of First Amendment rights arising from plaintiff's suspension from city employment following a lawsuit she brought against the city. However, contrary to Plaintiff's assertion, the Ninth Circuit considered the application of the First Amendment to a public employee's litigation not to determine whether the Connick "public concern" test applied, but rather to make the more preliminary determination of whether employee litigation is an activity entitled to constitutional protection for purposes of the Re Rendish "retaliation" test. Rendish, 123 F.3d at 1219-1223. The Ninth Circuit concluded that "[t]he right of access to the courts is subsumed under the first amendment right to petition the government for redress of grievances." Id. at 1220 (citing Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989). The Ninth Circuit then held that "a public employee's litigation must involve a matter of public concern in order to be protected by either the Petition Clause or the Speech Clause of the First Amendment," thus extending the Connick "public concern" test to public employee litigation, independently protected by the Petition Clause. Rendish, 123 F.2d at 1220.

The Court assumes that Plaintiff relies on the Speech Clause of the First Amendment, not the Petition Clause of the First Amendment, in his underlying claim against Defendants. The Court therefore concludes that it need not entertain a Rendish type analysis regarding the applicability of the Connick "public concern" test because the applicability of that test to expression otherwise protected by the Speech Clause of the First Amendment was never in dispute in Rendish. In Rendish, the Ninth Circuit was grappling with the issue

of whether expression covered by the Petition Clause should be subject to the same analysis as expression covered by the Speech Clause in the public employer/public employee context. Answering that question in the affirmative, the Ninth Circuit simply applied the Connick "public concern" test as it would in a case of expression under the Speech Clause, and that is what this Court does here.

The Court further assumes that Plaintiff does not assert that the subject expression is entitled to any more protection under the Speech Clause of the First Amendment than ordinary speech would enjoy. If the Court found that the subject expression did enjoy such enhanced protection, the Court would be treading on new territory establishing an analytical distinction within Speech Clause expression solely applicable in the public employer/public employee context. The Court declines to so tread. Therefore, the Court finds Plaintiff's attempt to distinguish Rendish from applicability in the instant matter unpersuasive. The Court thus applies the Connick "public concern" test to the subject expression presently at issue.

This conclusion resonates with the policy considerations driving the Connick "public concern" test, as expressed by the Supreme Court in Connick. The Supreme Court explained that "[w]hen employee expression cannot be fairly considered s relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal may not be fair, but ordinary dismissals from

government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable." Connick, 461 U.S. at 1690 (citing Board of Regents v, Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972); Bishop v. Wood, 426 U.S. 341 (1976)). In this case, Plaintiff was terminated for alleged violation of Police Department policies which were part of his employment contract, which policies he has not challenged, except on free speech grounds. The only issue then is whether Plaintiff's non-verbal, sexually explicit commercial expression is a matter of "public concern."

The Supreme Court stated that "when an employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of only personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." Connick, 461 U.S. at 1690 (citing Bishop v. Wood, 426 U.S. 341 (1976)). The Supreme Court developed the "public concern" limitation to prevent the government, purportedly acting in its capacity as employer, from taking such action that a public employee would "be prevented or `chilled' by the fear of discharge from joining political parties and ether associations that certain public officials might find 'subversive.' The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing

about of political and social changes desired by the people." Connick, 461 U.S. at 1688 (citing Roth v. United States, 354 U.S. 476 (1964)). Thus, the next step is for this Court to consider whether Plaintiffs subject expression is a matter of public concern such that Defendant's right to terminate him based upon such expression is limited.

"The inquiry into the protected status of speech is one of law, not of fact, Connick, 461 U.S. at 148 n. 7. `Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole of the record.' Id. at 147-148. Speech relating to any matter of political, social, or other concern to the community is protected. See id. at 146." Rendish, 123 F.3d at 1223. The Court cannot see, and Plaintiff has not shown, haw the production, marketing and sale of sexually explicit videos for commercial profit is a matter of public concern for purposes of the Connick "public concern" test. Plaintiff in this case was not expressing anything related to public affairs, commenting upon internal Department policies or procedures or even talking or litigating about work. The Court holds that Defendants have not acted to stifle the "unfettered interchange of ideas for the bringing about of political and social changes." Connick, 461 U.S. at 1688 (citing Roth v. United States, 354 U.S, 476 (1964)). Defendants' motion to dismiss is therefore GRATED. Dismissal of Plaintiff's First Amendment claims is with prejudice as the Court can see no way that Plaintiff can plead a cause of action which would not be barred by Connick.

3. Fourteenth Amendment Claims Dismissed

Defendants have alleged, and Plaintiff has conceded, that Plaintiff has no claim that his predeprivation due process rights under the Fourteenth Amendment were violated. The parties' agreement is predicated upon their correct interpretation of Loudermill v. Cleveland Bd. of Educ., 470 U.S. 532 (1985), that there is no predeprivation requirement under the Fourteenth Amendment that Plaintiff be furnished a copy of all materials upon which defendants relied for his termination. For the foregoing reasons, Plaintiff's Fourteenth Amendment claims are DISMISSED with prejudice.

4. California State Law Claims Dismissed

Defendants have alleged that because the Court should grant its motion to dismiss Plaintiffs First and Fourteenth Amendment claims, "Plaintiff's vague references to the California Constitution or California law are moot." Motion at 10. The Court agrees, and those claims are DISMISSED without prejudice if Plaintiff chooses to refile in state court.

5. Request for Judicial Notice Granted

Defendants request, pursuant to Fed. R. Evid. 201(d), judicial notice of four documents: (i) Plaintiff's Notice of Motion and Motion for Order Permitting Plaintiff to Proceed Under a Pseudonym; (ii) Plaintiff's Paints and Authorities in Support of Motion for Order Permitting Plaintiff to Proceed Under Pseudonym; (iii) Declaration of James M. Gattney in Support of Motion for Order Permitting Plaintiff to Proceed Under a Pseudonym;

and (iv) Declaration of Michael P. Baranic in Support of Motion for Order Permitting Plaintiff to Proceed Under a Pseudonym. Rule 201 mandates judicial notice of adjudicative facts not subject to reasonable dispute upon request by a party if that party supplies the necessary information. An adjudicative fact is not subject to reasonable dispute if (1) it is generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201. The subject material here meets all of these criteria and defendants' request for judicial notice is hereby GRANTED,

III. Conclusion

Considering the foregoing, the Court hereby GRANTS Defendants' motion to dismiss as to all claims. The Court also GRANTS Defendants' request for judicial notice.

IT IS SO ORDERED.
12/20/01
DATE

/s/
JUDGE JUDITH N. KEEP
United States District Court
Southern District of California

CASE NO. 01CV1760K (CGA)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOHN ROE

v.

CITY OF SAN DIEGO

JUDGMENT IN A CIVIL CASE

Filed December 26, 2001

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that dismissal of plaintiff's first amendment claims is with prejudice. The court grants defendants' motion to dismiss as to all claims. The court also grants defendants' request for judicial notice.

December 26, 2001
Date

Roberta Westdal
Clerk

Aracely Campbell
(By) Deputy Clerk

ENTERED ON December 26, 2001

No. 02-55164
D.C. No. CV-01-01760-JNK

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ROE,
Plaintiff-Appellant,

v.

CITY OF SAN DIEGO; SAN DIEGO CITY POLICE DEPARTMENT; DAVID BEJARANO; GEORGE SALDAMANDO; GLENN BREITENSTEIN,
Defendants-Appellees.

March 22, 2004, Filed

ORDER

BEFORE: D. NELSON, WARDLAW and FISHER, Circuit Judges.

Judges D. Nelson and Fisher have voted to deny appellees' petition for panel rehearing. Judge Fisher voted to deny the petition for rehearing en banc and Judge D. Nelson recommended denying the petition for rehearing en banc. Judge Wardlaw voted to grant appellees' petition for panel rehearing and rehearing en banc.

The full court has been advised of the petition for panel rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellees' petition for panel rehearing and rehearing en banc, filed February 12, 2004, is DENIED.

(2)

No. 03-1669

IN THE

Supreme Court of the United States

CITY OF SAN DIEGO, SAN DIEGO CITY POLICE DEPARTMENT, DAVID BEJARANO, GEORGE SALDAMANDO, GLENN BREITENSTEIN,

Petitioners,

v.

JOHN ROE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

MICHAEL P. BARANIC
Counsel of Record
GATTEY BARANIC LLP
2445 Fifth Avenue, Suite 350
San Diego, CA 92101-1665
(619) 232-8142

Attorneys for the Respondent

189174

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Ninth Circuit correctly held that Plaintiff/ Respondent John Roe engaged in speech on a matter of public concern?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners in this action are the City of San Diego, the San Diego Police Department, former Chief of Police David Bejarano, Assistant Chief George Saldamando, and Captain Glenn Breitenstein. Petitioners were the defendants in the district court and the respondents in the Ninth Circuit Court of Appeals.

Respondent

Respondent is "John Roe." Roe proceeded under a pseudonym pursuant to a district court order granting him permission to do so. Roe was the plaintiff in the district court and appellant in the Ninth Circuit Court of Appeals.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties To The Proceedings	ii
Table Of Contents	iii
Table Of Cited Authorities	iv
Introduction	1
Statement of the Case	2
Reasons for Denying the Petition	8
I. The Ninth Circuit Correctly Held that Roe Engaged in Speech on a Matter of Public Concern	8
A. The Court is Not Limited to Considering the Two Tapes Purchased by City Petitioners but Must Consider and Infer That Roe Offered and Sold the Tapes to a Broader Audience	8
B. The Cases Cited by City Petitioners as "Similar" to the Instant Matter Do Not Support Their Position	10
C. Roe Engaged in Speech on a Matter of Public Concern	15
Conclusion	18

TABLE OF CITED AUTHORITIES

Cases *Page*

Allen v. Scribner, 812 F.2d 426 (9th Cir. 1987) 16

Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985) .. 12

Berkovitz v. United States, 486 U.S. 531 (1988) ..8, 9, 10

Conley v. Gibson, 355 U.S. 41 (1957) 8

Connick v. Myers, 461 U.S. 138 (1983) 8, 16

Gillette v. Delmore, 886 F.2d 1194 (9th Cir. 1989) ... 15-16

Lawrenz v. James, 852 F.Supp. 986 (M.D.Fla. 1994) ..... *passim*

Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) 16

Pappas v. Guiliani, 118 F.Supp.2d 433 (S.D.N.Y. 2000) 10, 11, 12

Pickering v. Board of Education, 391 U.S. 563 (1968) 16

Pruitt v. Howard County Sheriff's Department, 96 Md.App. 60, 623 A.2d 696 (1993) ..... *passim*

Tindle v. Caudell, 56 F.3d 966 (8th Cir. 1995) .... *passim*

United States v. National Treasury Employees Union, 513 U.S. 454 (1995) 17

United States Constitution

First Amendment 1, 9, 11, 16

Statute

42 U.S.C. § 1983 7

Rule

Federal Rule of Civil Procedure12(b)(6) 7

INTRODUCTION

Plaintiff/Respondent John Roe[1] submits this Brief in Opposition in response to the Petition for Writ of Certiorari filed by the Defendants/Petitioners City of San Diego, the San Diego Police Department, David Bejarano, George Saldamando, and Glenn Breitenstein.[2]

Petitioners assert that the Court should review the decision in this matter because the United States Court of Appeals for the Ninth Circuit was incorrect when it reversed and remanded the matter, holding that Roe engaged in speech on a matter of public concern.

The First Amendment is not necessary to protect what is popular or appealing to the masses. The First Amendment is necessary to protect expression that is unpopular, unappealing to the masses and does not conform to the norm. Would a vast majority of the citizenry rush out to purchase the videotapes Roe offered on eBay? Probably not. Was there a substantial audience that did seek out and purchase the videotapes offered by Roe? We cannot tell from the record. We cannot tell from the record because the district court, apparently believing the size of the audience that actually sought out and purchased the videos offered by Roe to be irrelevant, imposed the harshest sanction available – dismissing Roe's complaint for failing to state a claim without affording Roe leave to amend.

---

1. "John Roe" is the fictitious name for a City of San Diego Police officer.

2. For convenience Petitioners City of San Diego, the San Diego Police Department, David Bejarano, George Saldamando, and Glenn Breitenstein may be referred to collectively as the "City Petitioners" in this brief.

Dismissal of Respondent John Roe's complaint by the district court was improper. The Ninth Circuit correctly held that Roe engaged in speech on a matter public concern and that his speech was protected. The Court should deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

John Roe was a non-probationary police officer employed by City of San Diego and the San Diego Police Department for approximately 7½ years prior to his termination. Petition for a Writ of Certiorari Appendix ("App."), 2a. Roe was terminated for his off-duty production and sale of sexually explicit, non-obscene videotapes. App.2a. The videotapes depicted Roe alone, engaging in masturbation, and did not identify Roe as an employee of or as being affiliated with City of San Diego or the San Diego Police Department. App., 2a. The videotapes were geared towards a gay, male audience and sold through the "adults only" section of the eBay internet auction website ("eBay"). App., 2a. The San Diego Police Department's investigation of Roe's off-duty conduct did not reveal that any member of the public recognized Roe from his eBay seller's profile, auction item descriptions, auction item pictures or any of the items he sold through eBay. App., 4a. Likewise, the San Diego Police Department's investigation did not reveal that any member of the public ever complained about Roe's production or sale of the videotapes or sale of any of the items of clothing he offered through eBay.

None of the documents relied on by the City Petitioners allege that any of the videotapes produced by Roe were obscene in nature; that Roe's eBay activities affected his productivity, performance or ability to do his job as a police

officer; that Roe's off-duty conduct in any way interfered with the regular operation of the San Diego Police Department; or that Roe actually displayed, manufactured, distributed or sold any sexually explicit materials after being ordered to cease such conduct.

In July 2000, Roe's sergeant, Robert Dare, searched eBay and located a tan uniform formerly used by the San Diego Police Department for sale. App., 3a, 52a. The uniform was offered for sale by a seller utilizing the eBay username "Code3stud@aol.com."[3] App., 3a, 52a. Dare also located a uniform formerly used by the National City Police Department also offered for sale by Code3stud@aol.com. App., 52a. Dare searched for other items offered by Code3stud@aol.com and eBay indicated that Code3stud@aol.com had items offered for sale in the "adults only" section but did not reveal what those items actually were. App., 3a, 52a.

In order to access the "adults only" section of eBay, Dare was required to certify that he was at least 18 years of age and of the legal age to access sexually explicit materials in his community. In order to confirm that he was at least 18 years old, Dare was required to provide eBay with a valid credit card number, valid credit card expiration date, the correct name to which the credit card is issued and the correct billing address to which the credit card statements are sent. As part of the process to gain access to the "adults only" area, Dare was required to certify that he would not permit anyone under 18 years of age to have access to any of the

3. "Code 3" is a code utilized by many police agencies to indicate that an officer is responding to a situation using the emergency lights and siren of the officer's patrol vehicle.

materials contained in the "adults only" area; that he voluntarily chose to access the "adults only" area because he wanted to view, read and/or hear the various materials available in that section; that he had the legal right to possess sexually explicit materials in his community; that he does not find pornographic images of nude adults, adults engaged in sexual acts or other sexual materials to be offensive or objectionable; and that he would immediately exit the "adults only" area if he was in any way offended by the sexual nature of the materials he sought to access. Dare made the required certifications, gained access to the "adults only" area and viewed a number of listings for items offered for sale by Code3stud@aol.com. App., 3a. Dare had been Roe's supervisor since January 2000, and recognized pictures of Code3stud@aol.com contained in the listings for various auction items as being Roe. App., 3a.

Dare printed out a number of the items offered for sale by Code3stud@aol.com and shared the printouts with other supervisors in Roe's chain of command. App., 3a. The San Diego Police Department initiated an investigation into Roe's lawful, off-duty conduct of selling, among other things, certain articles of clothing and the personal homemade videotapes on eBay. App., 3a.

As part of its investigation, on July 21, 2000, the San Diego Police Department investigators first purchased a pair of white men's briefs and a pre-made personal videotape offered for sale by Code3stud@aol.com. App., 3a, 53a. On September 7, after an exchange of e-mail correspondence between department investigators and Code3stud@aol.com, department investigators ordered another videotape depicting Code3stud@aol.com again alone, engaging in masturbation, but this time custom made to the investigator's specifications/ storyline. App., 3a.

As part of their investigation, department investigators had each of the items they purchased reviewed by United States Postal Service inspectors to determine whether Roe engaged in any criminal conduct or any conduct in violation of Postal Service regulations. After viewing the materials and videotapes sold and transmitted through the mails, the Postal Service inspectors advised department investigators that neither the sale nor transmission of the materials and videotapes through the mail constituted any criminal conduct or any conduct in violation of Postal Service regulations on the part of Roe.

None of the items offered for sale by Roe identified Roe as an employee of or as being affiliated with the City of San Diego or the San Diego Police Department. App., 4a, 52a. All aspects of the videotapes, including the production, manufacturing, sale and shipment of the videotapes were conducted while Roe was off-duty, away from his employer's premises, without using any City of San Diego or San Diego Police Department time or equipment and at no expense to the City or Department. App., 3a, 4a, 52a, 53a.

Roe went to great lengths to ensure that he was not identified as an employee of or as being affiliated with City of San Diego or the San Diego Police Department, 52a, 53a. Roe never identified himself by his true name in any sale or listing on eBay. App., 4a, 53a. Roe never identified himself as a police officer with City of San Diego or the San Diego Police Department in conjunction with any sale or listing on eBay. App., 4a. In an attempt to conceal his identity as a San Diego Police Department officer, Roe described himself, in his eBay seller's profile, as living "in Northern California" and being "in the field of Law Enforcement" without naming any specific department.

App., 4a, 53a. All payments for items sold by Roe on eBay were made to a "S. Shatswell"[4], and not to Roe, utilizing a post office box address in the northern California town of Tracy, approximately 450 miles north of San Diego. App., 4a, 53a.

On October 17, 2000, Roe was interviewed by a department investigator regarding his involvement in the sale of videotapes and items of clothing on eBay. App., 4a, 53a. Roe was completely truthful during the interview, admitted to the off-duty conduct and answered all of the investigator's questions. App., 4a.

On December 20, 2000, San Diego Police Department Captain Breitenstein ordered Roe "to cease displaying, manufacturing, distributing or selling any sexually explicit materials or engaging in any similar behaviors, via the internet, U.S. Mail, commercial vendors or distributors, or any other medium available to the public." App., 4a, 53a. Although Roe believed Breitenstein's order to be an unlawful order, in order to avoid a charge of insubordination or disobedience to a lawful order, Roe removed all items he had listed for sale on eBay. App., 4a, 53a, 54a.

On March 29, 2001, Roe was served with an Advance Notice of Adverse Action – Termination, signed by Breitenstein, proposing termination of Roe's employment. The proposal was based on allegations that Roe violated Department Policy 9.04 – Obedience to Lawful Orders; (App., 5a) Policy 9.06 – Unbecoming Conduct; Policy 9.07 – Immoral Conduct; and Policy 5.12 – Outside Employment. App., 4a, 54a.

---

4. Not Roe's true name.

On April 27, 2001, Roe participated in a pre-disciplinary conference, presided over by Breitenstein, in order for Roe to respond to the proposal to terminate his employment. App., 5a, 54a.

On June 29, 2001, Roe was served with a Notice of Termination signed by San Diego Police Department, Chief of Police David Bejarano upholding the proposal to terminate Roe's employment based on the charges alleged in the March 29, 2001, Advance Notice of Adverse Action. App., 5a, 55a. On June 29, 2001, just prior to being served with the Notice of Termination, Dare served Roe with a performance evaluation covering the period of January 7, to April 27, 2001. App., 5a, 55a. The evaluation concluded that Roe met San Diego Police Department standards for his position as a police officer and noted that Roe had received a letter of commendation during the rating period. App., 5a, 55a. The evaluation noted no deficiencies in Roe's performance for the rating period. App., 55a. Roe's employment with the City was terminated effective June 29, 2001, at 9:00 a.m. App., 5a.

On September 28, 2001, Roe brought suit against the City of San Diego, City of San Diego Police Department, as well as Chief of Police David Bejarano, Assistant Chief of Police George Saldamando and Captain Glenn Breitenstein in their official and individual capacities. App., 5a, 51a. Roe's claims against the City Petitioners regarding the termination of his employment were brought under 42 U.S.C. § 1983. App., 5a.

The City Petitioners brought a motion to dismiss Roe's Complaint pursuant to F.R.C.P. 12(b)(6). App., 5a. After full briefing and oral argument, the district court issued its order

on December 21, 2001, granting the City Petitioners' motion to dismiss. App., 5a. In granting the City Petitioners' motion, the district court found that Roe had "not shown how the production, marketing and sale of sexually explicit videos for commercial profit is a matter of public concern for purposes of the *Connick* 'public concern' test. App., 65a. [Roe] was not expressing anything related to public affairs, commenting upon internal San Diego Police Department policies or procedures or even talking or litigating about work." App., 65a.

Roe filed his appeal to the Ninth Circuit Court of Appeals on January 18, 2002. App., 4a.

REASONS FOR DENYING THE PETITION

I. The Ninth Circuit correctly held that Roe Engaged in Speech on a matter of Public Concern

A. The Court is Not Limited to Considering the Two Tapes Purchased by City Petitioners but Must Consider and Infer That Roe Offered and Sold the Tapes to a Broader Audience

For purposes of review, the Court "must assume that petitioners' well-pleaded allegations are true." *Berkovitz v. United States*, 486 U.S. 531, 540, (1988). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

In their Petition, City Petitioners latch on to the fact that, as pointed out by Roe in his Opening Brief to the Court of

Appeal, the District Court only had evidence before it that Roe sold two videotapes and sold the videotapes for a particular price. In his brief, Roe pointed out that the District Court had only that particular evidence before it to address the District Court's conclusion that the tapes were sold for "commercial profit". Roe noted that there was no evidence presented to establish whether a "profit" was made on the sales and pointed out that "the fact that materials may be published and sold for a profit does not prevent them from being a form of expression safeguarded by the First Amendment."

The City Petitioners assert that Roe "concedes" that the two videotapes were the only information before the District Court and conclude that the production and sale of the two videotapes, which were sold to the police department's investigator, form the entire basis of Roe's First Amendment claim. The City Petitioners then argue that the sale of the two videotapes was nothing more than a "private" sale between Roe and the San Diego Police Department investigator such that it did not implicate First Amendment concerns. Finally, the City Petitioners argue that Roe cannot establish that he "was engaged in the production and distribution of sexually explicit films."

The City Petitioners are incorrect in their conclusion that the entire basis of Roe's First Amendment claim is the sale of the two videotapes and that Roe cannot establish that he was engaged in the production and distribution of sexually explicit films. As noted above, for the purposes of review, the Court "must assume that petitioners' well-pleaded allegations are true." *Berkovitz v. United States*, 486 U.S. at 540. If this case turns on whether Roe sold only two tapes to the police department investigator or whether he produced,

offered, sold and distributed the sexually explicit films to a much larger audience of potential buyers who sought out the items on eBay, all reasonable inferences must be drawn in Roe's favor. *Id.* All reasonable inferences support the latter position that the videotapes were produced, offered, sold and distributed to interested buyers who sought out the items in addition to the two tapes sold to the police department investigator.

B. The Cases Cited by City Petitioners as "Similar" to the Instant Matter Do Not Support Their Position

In their Petition, City Petitioners try to compare Roe's conduct to that of a police officer sending unsolicited anti-Semitic and anti-black hate mail (*Pappas v. Guiliani*, 118 F.Supp.2d 433 (S.D.N.Y. 2000), a police officer wearing a racist Halloween costume to a party at a Fraternal Order of Police Lodge party (*Tindle v. Caudell*, 56 F.3d 966 (8th Cir. 1995), police officers' parody of Hogan's Heros involving Nazi salutes and clicking heels (*Pruitt v. Howard County Sheriff's Department*, 96 Md.App. 60, 623 A.2d 696 (1993); and a correctional officer wearing a white power T-shirt to a private barbeque (*Lawrenz v. James*, 852 F.Supp. 986 (M.D.Fla. 1994). Aside from the fact that only one of the cases cited is a federal circuit court decision, these cases are all easily distinguishable from the instant matter and do not support the City Petitioners' position.

City Petitioners assert that the district court in *Pappas v. Guiliani* addressed a case similar to the present. In *Pappas*, a police officer was terminated for sending *unsolicited* anti-Semitic and anti-black hate mail to various organizations from which he received solicitations seeking donations,

including another police department. When he would receive such solicitations, Pappas would fill the accompanying reply envelopes with anti-Semitic and anti-black hate mail and mail the envelopes back to those seeking donations. In analyzing whether Pappas engaged in speech on a matter of public concern or whether his speech was merely a personal grievance entitled to no First Amendment protection, the district court noted that courts have been particularly skeptical in cases where plaintiffs have sought to justify patently hateful and inflammatory speech in terms of "public concern." *Pappas* at 444, *citing Tindle v. Caudell*, 56 F.3d 966 (8th Cir. 1995) (police officer's off-duty donning of a "blackface" costume demeaning to blacks not an expression on a matter of public concern), *Lawrenz v. James*, 852 F.Supp. 986, 992 (M.D.Fla. 1994) (police officer's off-duty wearing of "white power" T-shirt is a matter private interest, not public concern); *Pruitt v. Howard County Sheriff's Dept.*, 96 Md. App. 60, 623 A.2d 696 (1996) (police officers' parody of Hogan's Heros involving Nazi salutes, clicking heels, and utterances in German was a matter of private amusement, not public concern). The three cases cited by the *Pappas* court for the position that courts are skeptical of plaintiffs who attempt to justify hate speech in terms of "public concern" are the same three cases relied on by City Petitioners and discussed below.

The *Pappas* court concluded that the "record makes evident that Mr. Pappas intended to convey no message of 'public concern' in his mailings to solicitors, he simply wanted to dissuade charities from soliciting money from him by offending them with racist mailings." *Pappas* at 445. The recipients targeted by Pappas did not seek out or request that the hate mail be sent to them. The recipients in the instant case, on the other hand, were all interested in, sought out

and voluntarily purchased the videos offered by Roe. A reasonable inference regarding the allegations of Roe's Complaint is that people, other than the police department investigator, purchased the videos, that the videos were purchased as entertainment and that no member of the public complained to the police department regarding Roe's conduct. The *Pappas* case is *not* similar to ours and does not support the City Petitioners' position.

The City Petitioners also try to compare Roe's conduct to that of the plaintiff in *Tindle v. Caudell*. Tindle was terminated for wearing a racist Halloween costume in which he dressed in bib overalls, painted his face black, donned a black curly wig and carried a watermelon to a costume party at the local Fraternal Order of Police Lodge. The party was attended by a number of other off-duty members of the police department, including several African-American officers. *Tindle*, 56 F.3d at 968. Tindle argued that he wore the costume to "entertain" the other party guests. In dismissing Tindle's claim that his costume was akin to that of the police officer in *Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1985), the court noted that "artistic expression before a public audience is quite different from a decision to wear a costume to a private Halloween party." *Tindle* at 970. The court also found it important that although the costume party occurred off-duty it was at the Fraternal Order of Police Lodge, was attended by members of the police department, was a function related to work and actually culminated in complaints from African-American officers of the department who were present and witnessed the conduct. *Id.* None of those factors are present in the instant case. As discussed in his complaint, Roe did not identify himself as a San Diego Police Department officer or City employee in any sales and went to great lengths to ensure that his conduct was not connected with the City or

Department. Unlike the complainants in *Tindle* who were involuntarily subjected to Tindle's racist costume by their mere attendance at the same party, the recipients in the instant matter voluntarily sought out and purchased the videos offered by Roe, and did so only after making the requisite certifications that they were not offended by such materials.

In their discussion of *Tindle*, City Petitioners state that the *Tindle* court likened their case to that faced by the Maryland Court of Special Appeals in *Pruitt v. Howard County Sheriff's Department*, 96 Md.App. 60, 623 A.2d 696 (1993), and try to equate the "private" activity engaged in by Tindle and the Pruitts with that of Roe. In *Pruitt*, Major Donald Pruitt and Sergeant Dennis Pruitt engaged in "Nazi-like" comments and behavior *while in uniform and in the presence of fellow officers and court personnel*. The conduct ranged from parodies of "Hogan's Heroes," including imitations of "Colonel Klink" and "Sergeant Schultz," exaggerated German accents, exaggerated military mannerisms such as the German Hitler hand salute and heel clicks, to the use of terms like "*achtung*" and "*sieg heil*." *Pruitt* at 65, n1. (emphasis added). The court found that:

> [u]pon review of the Pruitts' actions in light of their content, form, and context, we are compelled to conclude that such conduct is not speech on a matter of public concern. The Pruitts testified at the administrative hearing that their conduct was humorous in nature and intended as a joke – as a parody of Hogan's Heroes. Appellants' speech did not, by their own admission, contain any allegations of wrongdoing or present issues of public concern to the community.

Pruitt at 70.

Roe does not dispute the fact that a government employer has a great deal of discretion to regulate the speech of its employees when they speak as employees or when the speech takes place at the worksite. That is what the court was faced with in *Pruitt*. That is not the issue facing this Court. This Court is faced with the issue of speech by a public employee, that occurs off-duty, away from the employer's premises and which cannot be attributed to the employer.

Since the *Pruitt* court found that the officers' "conduct occurred in a private setting – generally away from the public view" (*Pruitt* at 701-02) and concluded that the speech in that case was "private", the City Petitioners try to squeeze the instant matter into that "private setting" language asserting the Roe engaged in a "very private activity" which was "for [his] own amusement". The "setting" at issue is where the *speech* occurred. In *Tindle* and *Pruitt* the speech occurred in areas that were generally out of the public view and only open to members of the department. In Roe's case, the "setting" where the speech occurred was on eBay, in a section open to interested members of the public who were of legal age to receive the materials. Although the videos may have been recorded in "private" the speech for which Roe was terminated was his speech in a public setting – eBay. Roe was not terminated for videotaping himself engaging in sexual activity. Roe was terminated for offering for sale and distributing those videotapes. Neither *Tindle* nor *Pruitt* support the City Petitioners' regulation of Roe's speech nor Roe's termination.

Finally, City Petitioners compare Roe's conduct to that of a corrections officer in *Lawrenz v. James*, 852 F.Supp. 986 (M.D.Fla. 1994). Lawrenz was a probationary corrections officer who, on January 18, 1993 (Martin Luther King's Day),

attended a private barbeque wearing a "White Power" T-Shirt. The barbeque was held at the home of a corrections officer and was attended by a number of other corrections officers. After becoming intoxicated, one of the officers fired an AK-47 rifle into the air. The police responded, the officer who shot into the air was arrested and the incident was covered by the media. Lawrenz was terminated and subsequently sued the department. During the course of the proceedings, Lawrenz conceded that his wearing the T-Shirt was "at least initially a matter of purely private concern" but became elevated to the level of constitutional importance because he and his co-workers discussed workplace race relations at the private barbeque. *Lawrenz* at 991. Noting that Lawrenz' "speech" occurred at a private party, which was attended by members of his department, the court found that "mere employee grievances, even when based on perceived unconstitutional discrimination or even where the grievance extends to the similar plight of coworkers, are not matters of public concern." *Lawrenz* at 992. Unlike the speech in *Lawrenz* which was found to be merely an employee grievance directed at the officer's co-workers, Roe's speech was directed at a segment of the public that sought out the videos he offered and was interested in receiving his message and was not merely a personal or employment related grievance.

C. Roe Engaged in Speech on a Matter of Public Concern

In analyzing speech by a government employee, made *as* a government employee, this Court follows a three-step approach when it reviews the termination of an employee that allegedly violates the free speech clause of the First Amendment. *Gillette v. Delmore*, 886 F.2d 1194, 1197

(9th Cir. 1989), *citing Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287 (1977). This Court must determine: 1) whether the employee's speech is entitled to constitutional protection, *see Pickering v. Board of Education,* 391 U.S. 563, 569-72 (1968); 2) whether, if protected, the speech was a substantial or a motivating factor in the action taken against the employee, *see Mt. Healthy,* 429 U.S. at 285-87; and 3) whether the government employer demonstrated that the same action would have been taken in the absence of the protected activity, *see Allen v. Scribner,* 812 F.2d 426, 433-36 (9th Cir. 1987), *amended*, 828 F.2d 1445 (9th Cir. 1987). The first element and ultimate issue – whether the speech is protected – is a question of law for the Court to decide. *Connick v. Myers*, 461 U.S. 138, 148, n. 7 (1983).

This first element, whether a government employee's speech addresses a matter of public concern, depends upon "the content, form, and context of [the speech] as revealed by the whole record." *Connick* at 147-48. City Petitioners apparently concede "that the production and/or distribution of sexually explicit films [i.e. movies] [is] protected under the First Amendment" but, without explaining why, conclude that such protection is "irrelevant" to this case. The fact that production and distribution of sexually explicit films is protected under the First Amendment is completely relevant to this case because it establishes that the "content" and "form" of speech engaged in by Roe is protected. The final factor the Court must consider is the "context" in which the speech is made. That is where the cases cited by City Petitioners are helpful. In *Tindle*, *Pruitt* and *Lawrenz*, all the speech at issue occurred either at work or at a work related function. Those government employers were within their rights to regulate their employee's speech because the speech

occurred either at work or was directed at the employee's co-workers. The "context" in this case clearly shows that the speech was not made at work nor to Roe's co-workers so as to have some impact on the San Diego Police Department but was made to a segment of the public that was interested in the videos being offered, actively sought out such materials, certified that they were not offended by such materials and only purchased the videos if they were interested in doing so.

Like the employees in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), Roe's speech and expressive activities "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to [his] government employer" therefore falling "within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace." *Id.* at 466.

The content, form and context in which Roe produced, offered and sold the videos establishes that he engaged in speech on a matter of public concern.

CONCLUSION

For the reasons set forth above, Plaintiff/Respondent John Roe respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

MICHAEL P. BARANIC
Counsel of Record
GATTEY BARANIC LLP
2445 Fifth Avenue, Suite 350
San Diego, CA 92101-1665
(619) 232-8142

Attorneys for the Respondent